150 U.S. 610
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RECORD, CASE No. 14,070.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 129.

SARAH HORN, APPELLANT,

vs.

THE DETROIT DRY DOCK COMPANY, THE DETROIT, BELLE ISLE AND WINDSOR FERRY COMPANY, AND FREDERICK SCHULENBURG.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED JULY 2, 1890.

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INDEX.

	Original.	Print.
Citation	*a*	1
Proof of service of citation	*b*	1
Bond on appeal	1	1
Transcript from State court	2	2
Bill of complaint	2	2
Exhibit A—Agreement between the Detroit Dry Dock Co. and Sarah Horn, June 27, 1881	14	9
B—Agreement of Frederick Schulenburg, June 28, 1881	19	12
Proof of service of subpœna	20	13
Subpœna	21	13
Appearance for defendants	22	14
Petition of Frederick Schulenburg for removal	23	14
Exhibit—Assignment of Sarah Horn to Frederick Schulenburg, June 28, 1881	26	16
Bond for removal	28	17
Order for removal	30	18
Register's certificate	31	18

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 1, 1893.

	Original.	Print.
Documentary evidence	32	19
Order for sale of steamboat "Garland"	32	19
Marshal's bill of sale of steamer "Garland"	33	19
Exhibit—Acknowledgment of satisfaction by Cuddy	37	21
Exhibit—Acknowledgment of satisfaction by Horn	38	21
Stipulation that judgment stand in Horn *vs.* Schulenburg	39	22
Stipulation to dismiss in Cuddy *vs.* "The Garland," &c	40	22
Stipulation as to satisfaction of costs in Cuddy *vs.* "The Garland," &c	41	22
Stipulation as to satisfaction of judgment in Cuddy *vs.* Horn *et al.*, &c	42	23
Stipulation to dismiss cases, Cuddy *et al. vs.* "Garland"	43	23
Stipulation to dismiss Horn *vs.* Detroit Dry Dock Co. *et al.*	45	24
Order dismissing Horn *vs.* Detroit Dry Dock Co. *et al.*	46	25
Exhibit McVittie 1—Assignment from Sarah Horn to Frederick Schulenburg, June 28, 1881	47	25
Exhibit A—Agreement between the Detroit Dry Dock Co. and Sarah Horn, June 27, 1881	49	26
Order docketing cause	55	29
Plea of Frederick Schulenburg	56	29
Plea and answer of Detroit Dock Co.	63	33
Replication to plea of Frederick Schulenburg	65	35
Transcript of evidence	66	35
Exhibits offered	66	36
Testimony of Alexander McVittie	68	36
Henry C. Wisner	92	52
Stipulation as to testimony	94	53
Testimony of John Atkinson	95	53
Sarah Horn	113	64
Alexander McVittie (recalled)	115	66
Albert Schulenburg	136	79
George Horn	141	82
Henry C. Wisner	142	82
Levi T. Griffin	148	86
Stipulation as to testimony	152	88
Final decree	153	88
Application for and notice of appeal	154	89
Order allowing appeal	155	89
Clerk's certificate	156	90

a The United States of America to The Detroit Dry Dock Company, The Detroit, Belle Isle and Windsor Ferry Company, and Frederick Schulenburg, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, in equity, and allowed on December 19th, A. D. 1889, wherein Sarah Horn is complainant and you are defendants, to show cause, if any there be, why the decree rendered against the said complainant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, judge of the district court of the United States for the eastern district of Michigan, this eighth day of March, in the year of our Lord one thousand eight hundred and ninety.

HENRY B. BROWN,
District Judge.

b [Endorsed:] The circuit court of the United States for the eastern district of Michigan. Sarah Horn *vs.* The Detroit Dry Dock Company *et al.* Citation. Filed March 11, 1890. Walter S. Harsha, clerk. F. A. Baker, sol. for complainant, Detroit, Michigan.

EASTERN DISTRICT OF MICHIGAN, *ss:*

On this 11th day of March, in the year of our Lord one thousand eight hundred and ninety, personally appeared Walter Barlow before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Henry C. Wisner, the solicitor of record for the within-named defendants, on the 10th day of March, A. D. 1890, personally, at the city of Detroit, Wayne county, Michigan, and that he at the same time showed to the said Henry C. Wisner the within citation personally; that this deponent is above the age of twenty-one years and a citizen of the United States of America.

WALTER BARLOW.

Sworn to and subscribed the 11th day of March, A. D. 1890.
WALTER S. HARSHA,
U. S. Commissioner, East. Dist. of Mich.

1 *Bond on Appeal.*

Know all men by these presents that we, Sarah Horn, Fred. A. Baker, and James A. Randall, of the city of Detroit, in the county of Wayne and State of Michigan, are held and firmly bound unto the Detroit Dry Dock Company, the Detroit, Belle Isle and Windsor

Ferry Company, and Frederick Schulenburg in the full and just sum of five hundred dollars, to be paid to the said The Detroit Dry Dock Company, The Detroit, Belle Isle and Windsor Ferry Company, and Frederick Schulenburg, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 5th day of February, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a session of the circuit court of the United States for the eastern district of Michigan, in equity, held July 2nd, A. D. 1888, in a suit depending in said court between the said Sarah Horn, as complainant, and The Detroit Dry Dock Company, The Detroit, Belle Isle and Windsor Ferry Company, and Frederick Schulenburg, as defendants, a decree was rendered against the said Sarah Horn, and the said Sarah Horn having obtained the allowance of an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said The Detroit Dry Dock Company, The Detroit, Belle Isle and Windsor Ferry Company, and Frederick Schulenburg, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second day of October next:

1½ Now, the condition of the above obligation is such that if the said Sarah Horn shall prosecute her said appeal to effect and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

SARAH HORN. [SEAL.]
FRED. A. BAKER. [SEAL.]
JAMES A. RANDALL. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved by—
H. B. BROWN.

2 *Record of Removal from Wayne Circuit Court. Filed June 7th, 1887. Walter S. Harsha, Clerk.*

STATE OF MICHIGAN:

To the circuit court for the county of Wayne, in chancery:

Your oratrix, Sarah Horn, who resides in said city of Detroit, filing this her bill of complaint against the Detroit Dry Dock Co. and the Detroit, Belle Isle & Windsor Ferry Co., both of which are corporations organized under the laws of the State of Michigan and residents of said city of Detroit, and Frederick Schulenburg, who is a resident of St. Louis, Missouri, respectfully shows:

1st. That on the 22nd day of July, 1880, she was the owner of

the steamers Excelsior and Garland, used in navigating the Detroit river and connecting waters, of the value of sixty thousand dollars and upwards, subject to two mortgages then held by said Detroit Dry Dock Company—one on the Excelsior for $16,000, on which there was due $10,143, and one on the Garland for $12,500, leaving her an equity of redemption in the two steamers worth $27,000 and upwards.

2nd. That on that day, while the Garland was proceeding on an excursion down the Detroit river, she collided with the steam-yacht Mamie, having on board an excursion of acolytes from Trinity church, in Detroit, and a large number of those on board the Mamie were drowned.

3d. That the personal representatives and heirs of those so drowned claimed that the Garland was in fault and commenced suits in the district court of the United States, in admiralty, to recover damages on account of their death.

3 That about the same time a suit was commenced in the maritime court of Ontario against the Garland for sundries alleged to have been furnished by parties residing in Canada, and an attachment was issued and levied upon her, and she was ordered sold, *independente lite*, and the said Detroit Dry Dock Company, on said sale, purchased said steamer for your oratrix for $17,050, which sum it advanced on an agreement with your oratrix, making the entire indebtedness of your oratrix to said Detroit Dry Dock Co. $39,003.

That after the seizure of the Garland under the writ from the maritime court of Ontario said Detroit Dry Dock Company claimed that its security was insufficient, and your oratrix executed a second mortgage on the Excelsior as collateral to and to secure the same indebtedness covered by the mortgage upon the Garland of $22,500 to said Detroit Dry Dock Company.

That shortly after said collision a prosecution was commenced against George Horn, who was master of the Garland at the time of said collision and who is a son — your oratrix, — employed Messrs. Wisner and Speed, attorneys and counselors-at-law, of Detroit, to defend him, and also to defend the Garland in the suits commenced against her in the district court of the United States, and to defend certain suits commenced against your oratrix personally for damages on account of said collision, before the steamboat inspectors and the coroner's jury.

That said Detroit Dry Dock Company furnished a bond for said steamer in the district court of the United States and became responsible to Wisner and Speed, counsel for your oratrix, for their fees, at your oratrix's request and under her agreement to save it harmless from all liability thus assumed; and it was agreed that said Detroit Dry Dock Company should hold the title to said steamer Garland and the mortgages above named as security

4 for the indebtedness aforesaid and all liabilities incurred by it on behalf of your oratrix.

That the sum for which said Garland had been sold, and which had been paid into the maritime court of Ontario, was greatly in

excess of the claims proved against her in said court, and said dry dock company filed a petition to have the surplus proceeds paid to it as mortgagee, and agreed to credit your oratrix with whatever might be obtained upon said petition after the payment of all expenses of collecting the same.

4th. That on the 21st day of September, 1880, your oratrix conveyed the Excelsior, subject to the mortgages aforesaid, to her son, John Horn, and shortly afterwards an execution against him was levied upon her; that your oratrix, being personally responsible for the mortgage upon said steamer, entered into an agreement with the said Detroit Dry Dock Company, by which said Detroit Dry Dock Company agreed to purchase said steamer on the sale upon said execution for your oratrix, and to advance the money necessary to pay the sum bid for said steamer, and to purchase the same in its own name or in the name of some one to be designated by it, and to hold the two steamers as security for the indebtedness and advances aforesaid, and to run and operate the same and render a faithful account of their earnings to your oratrix, and, when the indebtedness and advances aforesaid were paid, return said steamers to your oratrix; that said steamer was, on the 24th day of November, 1880, sold upon said execution, and Alexander McVittie, secretary of said Detroit Dry Dock Company, became the purchaser thereof for $505, which sum was advanced by said Detroit Dry Dock Company.

5th. That some doubts having been raised as to the power of the Detroit Dry Dock Company to engage in running said steamers, it caused to be organized a corporation called the Detroit River Ferry Company, to act as trustees in carrying out its agreement with your oratrix, and caused the steamers Garland and Excelsior to be conveyed to it; that all the stock in said Detroit River Ferry Company was subscribed for and held by the stockholders of said Detroit Dry Dock Company and actually belonged to said dry dock company.

That soon afterwards it was found that the two steamers could be run more profitably by having a third one to run in connection with them, and said Detroit Dry Dock Company purchased the steamer Fortune for $23,000 and caused her to be conveyed to the said Detroit River Ferry Company; that the officers and stockholders of said Detroit River Ferry Company were the same as those of the Detroit Dry Dock Company, and the title to said steamers Garland and Excelsior was taken by said Detroit River Ferry Company with full notice of your oratrix's rights in the premises and subject thereto; that said Detroit Dry Dock Company also agreed out of the earnings of said steamers to pay her $200 per month while said steamer should be operated by or under its direction.

6th. That it was afterwards found to be profitable to consolidate the said Detroit River Ferry Company and the Detroit and Windsor Ferry Company, engaged in a similar and rival business, and a new company was incorporated for that purpose under the laws of Michigan, called the Detroit, Belle Isle and Windsor Ferry Company,

and said steamers were conveyed to it, and said Detroit Dry Dock Company received in payment for said steamers Garland, Excelsior, and Fortune capital stock in said new company to the amount of $83,000; that after receiving said stock it was agreed between your oratrix and the said Detroit Dry Dock Company that she should have of said stock, in payment for said steamers Garland and
6 Excelsior, $60,000, and that the same should be held by said Detroit Dry Dock Company in lieu of said steamers to secure the payment of your oratrix's indebtedness to it, and that the dividends upon it should be paid to said Detroit Dry Dock Company and applied first to pay her $200 per month for living expenses and next upon her indebtedness until the same was paid.

That said $60,000 par value of said stock was actually worth at that time $70,000 and upwards.

7th. That under said agreement the said Detroit Dry Dock Company controlled and received dividends upon all of said stock until June 26th, 1881, and received upon its petition in the maritime court of Ontario $11,000 and upwards over and above all expenses incurred in selecting the same, reducing your oratrix's indebtedness to it from $39,693 to less than $29,000.

8th. That in June, 1881, Albert Schulenburg, who is the son of said Frederick Schulenburg and the son-in-law of your oratrix, in whom she had the utmost confidence, and who at the time was living at the house with her, falsely and fraudulently represented to your oratrix that said Detroit Dry Dock Company would not carry said stock any longer for her, and insisted on being paid the sums due it from her, and that his father, who was a wealthy man, would advance the money to pay the said Detroit Dry Dock Company, and would assume all liabilities which it had assumed on behalf of your oratrix, and would pay your oratrix said sum of $200 per month for three years for living expenses, and would take and hold said stock and manage the same, and at the end of three years de-
7 liver back to your oratrix $25,000 par value of said stock, free and clear of all incumbrances; that your oratrix relied upon said representations and agreed to said proposal; that up to that time her arrangement with said Detroit Dry Dock Company had not been reduced to writing; that afterwards, to wit, on the 27th day of June, 1881, a paper was brought her by said Albert Schulenburg, which he represented had been drawn by her counsel, Wisner and Speed, and which he said was her agreement with the said Detroit Dry Dock Company reduced to writing; that he had caused it to be written out for the purpose of having the transfer made to his father; that, on account of her faith in said Schulenburg and her counsel and the said Detroit Dry Dock Company, she signed the same without any particular examination, believing it to be what it was represented to her by said Schulenburg to be; that copy of said paper is hereto attached, marked "Exhibit A."

That at the same time the said Schulenburg presented to her a paper which he said had been drawn by her counsel, Wisner and Speed, for the transfer of said six hundred shares of stock to the said Frederick Schulenburg, which your oratrix signed and deliv-

ered to the said Albert Schulenburg for said defendant, Frederick Schulenburg; that by said transfer your oratrix gave the said Schulenburg the right to receive said stock, which was worth at that time at least $70,000, and to receive the surplus proceeds coming to the said Detroit Dry Dock Company from the maritime court of Ontario, amounting to $11,000 and upwards, upon paying her indebtedness to the said Detroit Dry Dock Company, amounting in all to less than $40,000.

That on the day following said Albert Schulenburg brought her a paper, a copy of which is hereto attached, marked "Exhibit B;" that when brought it was signed by said defendant, Fred-
8 erick Schulenburg; that upon reading it she discovered that it only covered the monthly payments, and was silent as to the $25,000 of stock which the said Schulenburg had agreed, at the end of three years, to return to her free and clear from all incumbrances; that she refused to accept it on the ground that it did not represent the agreement of the said Frederick Schulenburg; that said Albert Schulenburg, upon her refusal, stated to her that it would make no difference; that his father would carry out his agreement to the letter, and threw said paper in a desk which he then used, in the house of your oratrix, where it remained until the said Albert Schulenburg left the house some six months afterwards, when he left said paper in said desk, where your oratrix found it.

9th. That, as your oratrix is informed and believes, and so states the fact to be, the said Frederick Schulenburg immediately presented her transfer to the said Detroit Dry Dock Company and received all of said stock, except one hundred and seventy-five shares of the par value of one hundred dollars each, which said Detroit Dry Dock Company still holds as security against contingent liabilities incurred by it on behalf of your oratrix, and on which said Detroit Dry Dock Company has received dividends since that time; that on receiving the same he paid the indebtedness of your oratrix to said Detroit Dry Dock Company, but just what sum he paid she has never been able to learn. She alleges that her indebtedness to said company at that time was as follows:

Amount due upon the mortgage upon the Garland.....	$12,500
Amount due upon the mortgage on the Excelsior.....	10,143
Amount advanced to buy the Garland...	17,050
Amount advanced to buy the Excelsior.....	505
Making in all.....	$40,198
Less the amount received from the surplus proceeds of the Garland, about.....	11,000
9 Making a total indebtedness against her of not more than.....	$29,198

That from this sum there should also be deducted the earnings of said stock, of which she has never had an account; that said stock was on that day worth at least $70,000, leaving her an interest in it over and above all liabilities of $40,000 and upwards.

10th. That said Schulenburg paid her during the next three years two hundred dollars per month, as agreed, but at the end of said three years repudiated his agreement to return to her $25,000 par value of said stock, sometimes pretending that no such agreement was made, and at other times that it was void because it was not in writing.

11th. That, despairing of obtaining any redress from said Schulenburg by friendly negotiations, she brought suit against him in the circuit court of the United States for the eastern district of Michigan, and on the trial before a jury recovered a verdict of $32,000 and upwards; that a new trial was granted the said Schulenburg in said court, and, on a second trial being had, the judge of said court held that your oratrix had no remedy at law, and that her proper remedy was in equity, and directed a verdict in favor of the said defendant, Schulenburg, as in and by the record files and proceedings in said cause in said court will more fully appear, and to which for greater certainty she prays leave to refer.

12th. That said Frederick Schulenburg now holds all of said stock, except one hundred and seventy-five shares held by said Detroit Dry Dock Company, as above stated, and that in equity
10 and good conscience your oratrix is entitled, if the agreement made with the said Frederick Schulenburg is valid, to $25,000, par value, of said stock, and the earnings thereof since the same should have been delivered to her, and in case said agreement is held invalid she is entitled to have the whole of said stock and the earnings thereof, upon repaying said Schulenburg his advances on account thereof, which she is ready and willing an- now offers to do, and to have said Schulenburg declared a trustee for her.

13th. That your oratrix alleges that said Schulenburg has received from the earnings of said stock, as she is informed and believes and so states the fact to be, more than enough to reimburse him for all payments made on behalf of your oratrix, with interest.

14th. That all of the claims, actions, suits, and proceedings against the said steamer Garland and against your oratrix arising out of said collision have been fully compromised and settled and wholly released and discharged by the payment by the Detroit Dry Dock Company, with the approval of your oratrix, of the sum of $3,000 in full payment and satisfaction of the same, and all suits, actions, judgments, and proceedings based thereon or arising therefrom have been discharged of record, and the stock held by the Detroit Dry Dock Company and by the said Frederick Schulenburg in the Detroit, Belle Isle and Windsor Ferry Company is fully released therefrom.

15th. And your oratrix further shows that the earnings of said stock are very large, and that the said Frederick Schulenburg and the said Detroit Dry Dock Company are in receipt thereof,
11 and refuse to render to your oratrix any account of the amounts from time to time received by them as dividends upon said stock.

That your oratrix is fearful that said Frederick Schulenburg, unless restrained by the order of this court, will transfer said stock,

so far as it is held by him, to third parties, and thereby prevent your oratrix reaching the same; that she is also fearful that said Detroit, Belle Isle and Windsor Ferry Company will permit said transfer to be made unless restrained by the order of this court, and will cause the same to be *to be* entered upon its books so as to prevent your oratrix from reaching the said stock; that said Detroit, Belle Isle and Windsor Ferry Company is practically controlled by said Frederick Schulenburg and the said Detroit Dry Dock Company, the stock owned by the said Detroit Dry Dock Company and the stock owned by your oratrix and in the hands of the said Frederick Schulenburg and said Detroit Dry Dock Company as aforesaid constituting a majority of all stock of said ferry company; that your oratrix is also fearful that said Detroit Dry Dock Company will transfer to the said Frederick Schulenburg the remainder of said stock now in its hands, and which in equity and good conscience belongs to your oratrix, unless restrained by the order of this court.

To this end, therefore, and inasmuch as your oratrix is remediless at and by the strict rules of the common law, that the said Frederick Schulenburg, the said Detroit Dry Dock Company, and the said Detroit, Belle Isle and Windsor Ferry Company may, without oath (their answer under oath being hereby expressly waived), answer this your oratrix's bill, and that the said Frederick Schulenburg may be decreed, in case his agreement with your oratrix is held to be valid, to transfer to your oratrix $25,000 par value of said
12 stock, free and clear of all incumbrances, and to account for and pay over to your oratrix the earnings of said stock since the same should have been transferred to her, and, in ase said agreement is held to be invalid, that said Frederick Schulenburg and the said Detroit Dry Dock Company may be declared to be trustees for your oratrix of all of said stock, and that an account may be taken of the indebtedness of your oratrix to them or either of them on account of said stock and of the earnings of said stock in their hands, and, in case the earnings of said stock shall be found to be more than the indebtedness to your oratrix on account thereof, that they be directed to pay over to your oratrix whatever balance may be found in her favor, and in case of their failure so to do that she may have an execution against their goods, chattels, lands, tenements to satisfy the same, your oratrix offering in case any balance is found against her to pay the same, and that said Detroit, Belle Isle and Windsor Ferry Company may be enjoined temporarily, during the pendency of this suit, and perpetually, upon a decree being made herein, from permitting any transfer to be recorded upon its books of said stock by the said Frederick Schulenburg, and that it may be decreed to admit your oratrix to the rights of a stockholder in said ferry company by reason of her ownership of said stock, and that said Frederick Schulenburg may be enjoined by the order of this court, temporarily during the pendency of this suit, and perpetually, upon a decree being made, from making any transfer of said stock or in any way changing the present status thereof, except by carrying out this said agreement with your oratrix or returning said stock to her, and that said Detroit Dry Dock

Company may be enjoined from transferring the remainder of said stock in its hands to the said Frederick Schulenburg or to
13 any other person except your oratrix, or that she may have such other and further relief as the nature of her case may require and as shall be agreeable to equity.

May it please the court to grant to your oratrix a writ of injunction directed to the said Detroit Dry Dock Company and said Detroit, Belle Isle and Windsor Ferry Company and said Frederick Schulenburg, commanding the said Frederick Schulenburg to desist from making any transfer of the remainder of said stock in its hands to the said Frederick Schulenburg, and commanding that said Detroit, Belle Isle and Windsor Ferry Company desist from permitting any transfer to be recorded upon its books of any portion of said stock until the further order of this court.

May it please the court to grant a subpœna directed to the said Frederick Schulenburg, the said Detroit Dry Dock Company, the said Detroit, Belle Isle and Windsor Ferry Company, commanding them to appear and answer this bill and abide by the order of the court herein; and your oratrix will ever pray, &c.

SARAH HORN.

F. A. BAKER,
Solicitor for Compl't.

STATE OF MICHIGAN, } ss:
County of Wayne, }

On this 10th day of May, 1887, before me personally came Sarah Horn, who, being duly sworn, says she had heard read the above bill by her subscribed and knows the contents thereof, and that the same is true of her own knowledge except as to matters therein stated to be upon information and belief, and as to those matters she believes it to be true.

CHAS. T. WILKINS,
Notary Public, Wayne County, Mich.

14 "EXHIBIT A."

Memorandum of agreement between the Detroit Dry Dock Company, party of the first part, and Sarah Horn, party of the second part, witnesseth as follows:

Whereas Sarah Horn was the owner of the steamers Excelsior and Garland; that on the 1st day of April, 1880, a mortgage was made by her to the Detroit dry dock engine works on the steamer Excelsior for $16,000 and interest at 10 per cent., on which there was due May 10th, 1880, $10,143, which sum has been assumed and paid by the Detroit Dry Dock Company; that on the 5th day of June, 1880, a mortgage on said steamer Garland was made by Sarah Horn, to the Detroit Dry Dock Company for $12,500 and interest at 10 per cent., and subsequently on the 11th day of September, 1880, a mortgage was made by Sarah Horn to said Detroit Dry Dock Company for $12,500 on said steamer Excelsior; that by said

mortgage it was intended to secure the payment of the said debt by said mortgage on the Garland, and such advances as might be made by said Detroit Dry Dock Company to or for the account of Sarah Horn; that on the 17th of August, 1880, said steamer Garland was attached by warrant, issued by the maritime court of Ontario at the suit of Messrs. Odette and Wherry and she was sold under the proceedings so commenced and by the order of said court on the 14th day of September, 1880, to the Detroit Dry Dock Company for the sum of $17,050; that on the 16th of September, 1880, said Detroit Dry Dock Company conveyed said steamer Garland to the Detroit River Ferry Company; that on the 21st day of September, 1880, said Excelsior was sold by said Sarah Horn to John Horn, Jr., and on the 24th day of November, 1880, under an execution issued out of the circuit court for the county of Wayne, on judgment recovered by John H. Kapel, executor of the estate of Henry Stevens,
15 deceased, against said John Horn, Jr., said steamer Excelsior was conveyed by said Alexander McVittie to the Detroit River Ferry Company for the sum of five hundred and fifty dollars; that the said Detroit Dry Dock Company for the purpose of protecting its interest and making its property in said steamers Garland and Excelsior more valuable, also purchased in the name of the Detroit River Ferry Company the steamer Fortune for $28,600; that on the 10th day of May, 1881, said steamers Garland, Excelsior and Fortune were conveyed by said Detroit River Ferry Company to the Detroit, Belle Isle and Windsor Ferry Company, a corporation formed to unite the interests of said Detroit River Ferry Company with those of the said Detroit and Windsor Ferry Company, and stock of said Detroit, Belle Isle and Windsor Ferry Company, for the consideration of such sale, viz., eighty-three thousand dollars was issued to John Owen, R. P. Toms, Stephen R. Kirby and Alexander McVittie in trust for said Detroit Dry Dock Company the stock of said Detroit River Ferry Company having been held and owned by said Detroit Dry Dock Company. That there is now pending in the district court of the United States for the eastern district of Michigan, in admiralty, suits against said steamer Garland brought by James H. Cuddy and others for damages claimed to have been sustained by a collision between the said steamer Garland and the yacht Mamie, on the 22nd day of July last; that the Detroit Dry Dock Company has filed a petition in said maritime court of Ontario for recovery against the steamer Garland of the amount payable upon the said mortgage of said company of June 5th, 1880, and the payment thereof is opposed by certain persons claiming damages sustained by the said collision between said Garland and the yacht Mamie, who are prosecuting suits against the said Garland in said maritime court of Ontario, and all of which suits now remain undetermined.

16 And whereas said Sarah Horn has expressed a desire to purchase a part of said stock, and said Detroit Dry Dock Company in view of the matters aforesaid and of its past business relations with said Sarah Horn is now disposed to deal generously with said Sarah Horn by making a favorable sale to her of part of

said stock, although it does not admit she has any legal claim upon said company in respect thereto:—

Now this agreement witnesseth that said part- of the first part hereby agree*d* to sell and deliver to said party of the second part, her executors, administrators or assigns, six hundred shares of the capital stock of the Detroit, Belle Isle and Windsor Ferry Company, each of the par value of one hundred dollars issued as aforesaid, and second will advance and pay to Messrs. Wisner and Speed, their disbursements, expenses, paid or to be paid out or expended, and their charges for services rendered or to be rendered by them in the suits in the district court aforesaid and the maritime court of Ontario against said Garland, in the Supreme Court of the United States on the application of the Detroit River Ferry Company for a writ of prohibition, in the Wayne county circuit court in the case of The People *vs.* George D. Horn, in the superior court of Detroit in cases of James H. Cuddy, administrator, etc., against Sarah Horn *et al.*, in the supreme court of Michigan on error to said superior court, and also for attendance and services on investigation of said collision*on* before the United States steamboat inspectors and before the coroner's jury, and for their services, expenses, and disbursements in any other matter or suit which has arisen or may arise out of said collision, and third, will also pay to said party of the second part (or apply on her indebtedness if any part remains unpaid) whatever sums of money that the*y* may be paid to said company by said maritime court of Ontario out of the proceeds of the sale
17 of said steamer Garland, after deducting costs and expenses of the litigation in said court or otherwise.

And in consideration of the agreements aforesaid said party of the second part hereby agrees to pay to said party of the first part, its successors and assigns, the sum of fifty-one thousand dollars within three years from the date thereof with annual interest at the rate of ten per cent. per annum, and also any sum or sums of money that may be paid by said party of the first part to Wisner and Speed as aforesaid and any sum or sums of money that may be paid by said party of the first part on any decree or decrees that may be rendered by said district court of the United States or by the circuit court of the United States upon appeal against said steamer Garland, or against the stipulators upon any stipulation or bond given or to be given in said suits in said district court and any costs, expenses or charges that said party of the first part may pay out or disburse in respect to said suits or other suits commenced or to be commenced in said district court or elsewhere against said steamer Garland, growing out of said collision with said Mamie, to recover the same damages sought to be recovered in the suits pending at the date of this instrument; the sums so paid to Wisner and Speed and upon any decree or decrees or for costs, charges or expenses in said suits to be added to and form part of this indebtedness of said party of the second part to be paid within three years from the date hereof (if said litigation is concluded or if not, then within thirty days after the same be concluded) with annual interest at the rate of ten per cent. per annum. The said six hundred shares of stock

to be delivered upon payment of the sums herein agreed by said party of the second part to be paid, and if said party of the
18 second part should fail to pay any part of the moneys agreed to be paid, said party of the first part may sell enough of the said stock to pay the same, but at not less than its par value, nor upon less than ten days' notice to the said party of the second part. It is understood that so much of the stock of said Detroit, Belle Isle and Windsor Ferry Company, shall be delivered to said party of the second part as shall be equitable upon pa. ments made to apply on the indebtedness by her herein agreed to be paid.

And it is further agreed that any dividends received by said party of the first part upon said stock, shall be applied upon the said indebtedness of the party of the second part, herein agreed to be paid.

And the said Sarah Horn in consideration of the said agreement of said Detroit Dry Dock Company does hereby release, discharge, convey and quitclaim any and all interests, claim or demand of any kind or nature whatsoever she may have or pretend to claim to have against said Detroit Dry Dock Company, to either of said boats or to the earnings or the proceeds of sale, received or to be received by said Detroit Dry Dock Company, or by either of said ferry companies.

It is expressly agreed by and between the parties hereto that this agreement shall apply to and bind their respective heirs, executors, administrators, successors or assigns.

In witness whereof the parties to these presents have executed the same in duplicates, and the said Sarah Horn has executed the same under her hand and seal and the Detroit Dry Dock Company has affixed its corporate seal and caused the same to be subscribed by its secretary this 27th day of June, A. D. 1881.

Attest: A. McVITTIE.
DETROIT DRY DOCK COMPANY. [SEAL.]
SARAH HORN. [SEAL.]

Witness:
JOHN HORN, JR.

19 "EXHIBIT B."

In consideration of the assignment by an instrument of this date, made by Sarah Horn to me all her interest in and claim to six hundred shares of the stock of the Detroit, Belle Isle and Windsor Ferry Company, agreed to be delivered to her by the Detroit Dry Dock Company in an agreement dated June 27th, 1881, and also of interest in and claim to certain moneys mentioned in said agreement, and to be paid to her by said company, and which assignment is made subject to the performance of the conditions, payments, and other terms therein contained and by her to be performed or paid, I do hereby agree to pay to said Sarah Horn the sum of two hundred dollars ($200) per calendar month for three years from and after this date.

In witness hereof I have hereunto set my hand and seal this 28th day of June, A. D. 1881, in duplicate.

FREDERICK SCHULENBURG. [SEAL.]

Witness:
FRED. C. HARVEY.

20 *Proof of Service.*

STATE OF MICHIGAN, } ss:
County of Wayne, }

I hereby certify and return that on the eleventh day of May, A. D. 1887, I served the annexed subpœna personally on Frederick Schulenburg, the Detroit Dry Dock Company, by delivering to Alexander McVittie, secretary and treasurer of said Detroit Dry Dock Company, a true copy of said subpœna, and showing him at the same time the original under the seal of the court; the Detroit, Belle Isle, and Windsor Ferry Company, by delivering to George W. Brady, secretary and treasurer of said Detroit, Belle Isle and Windsor Ferry Company, a true copy of said subpœna, and showing him at the same time the original under the seal of the court; by delivering to each of said defendants, at Detroit, in said county, a true copy of the annexed subpœna, inscribed copy, and subscribed F. A. Baker, complainant's solicitor, and at the same time I showed each of said defendants the original subpœna, with the seal of the court impressed thereon.

Dated Detroit, May 11th, 1887.

LOUIS B. LITTLEFIELD, *Sheriff,*
By GEO. D. ANDERSON,
Deputy Sheriff.

Fees, $3.00.

21 *Subpœna.*

STATE OF MICHIGAN, ss:

The Circuit Court for the County of Wayne. In Chancery.

In the name of the People of the State of Michigan to Frederick Schulenburg, the Detroit Dry Dock Company, and the Detroit, Belle Isle & Windsor Ferry Company, Greeting:

You are hereby notified that a bill of complaint has been filed against you in the circuit court for the county of Wayne, in chancery, by Sarah Horn, as complainant, and that if you desire to defend the same you are required to have your appearance entered with the register of said court, at his office, in the city of Detroit, in person or by solicitor, within twenty days after the 25th day of May, in the year 1887, which is the return day of this writ. Hereof fail not under the penalty of having said bill taken as confessed against you.

Witness the Hon. Wm. Jennison, presiding circuit judge, at De-

troit, this 11th day of May, in the year of our Lord one thousand eight hundred and eighty-seven.

WM. P. LANE, *Register*,
By CHAS. KELLOGG,
Deputy Register.

Underwriting: A personal decree is sought against all the defendants.

F. A. BAKER,
Solicitor for Compl't.

Filed May 12th, A. D. 1887.

WM. P. LANE, *Register.*

22 *Præcipe for Appearance.*

The Circuit Court for Wayne County. In Chancery.

SARAH HORN
vs.
FREDERICK SCHULENBURG, THE DETROIT DRY DOCK CO., and THE DETROIT, BELLE ISLE AND WINDSOR FERRY COMPANY.

To Wm. P. Lane, Esq., register of said county:

You will please enter the appearance of the above-named defendants, together with the usual order for service of a copy of the bill of complaint.

Yours, etc.,

H. C. WISNER,
Solicitor for Defendants.

23 *Petition of Frederick Schulenburg.*

STATE OF MICHIGAN, } *ss:*
County of Wayne, }

In the Circuit Court for the County of Wayne. In Chancery.

SARAH HORN, Complainant,
vs.
THE DETROIT DRY DOCK COMPANY, THE DETROIT, BELLE ISLE & Windsor Ferry Company, and Frederick Schulenburg, Defendants.

To the circuit court for the county of Wayne, in chancery:

Petition of Frederick Schulenburg respectfully shows—

That this cause is a suit of a civil nature in equity, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

That the same was commenced by the filing of a bill of complaint on May 11th, 1887, and is now pending.

That your petitioner (and the other defendants) duly appeared, according to the rules of said court in said cause, on the 23d day of May, 1887, and demanded a copy of said bill of complaint, which was duly served on May 27th, 1887.

That the time when said defendants are required, by the rules of this court, to answer said bill of complaint is the 16th day of June, 1887.

That at the time of the commencement of this suit the complainant, Sarah Horn, was, and she still is, a citizen of the State of Michigan and a resident of the city of Detroit.

24 That at the time of the commencement of said suit your petitioner was, and he still is, a citizen of the State of Missouri and a resident of the city of St. Louis, and said other-named defendants at all times have been and are now corporations existing under the laws of Michigan.

That at the time of the commencement of said suit the said Detroit Dry Dock Company held no stock in said ferry company, as alleged in paragraph 9th of the bill of complaint, nor has it held any stock in said ferry company since the 3d day of May, 1883, nor since then has it in any way been interested in or connected with the said ferry company, the stock of said company, or your petitioner, directly or indirectly, nor is it in any way interested in the controversy between complainant and your petitioner herein.

Your petitioner further shows that he has attached hereto as an exhibit a true and exact copy of the whole of the paper referred to in 2nd subdivision of paragraph 8th of said bill of complaint, which complainant has for some reason unknown to your petitioner neglected to make an exhibit to her bill.

Your petitioner further shows that the entire controversy in said suit arises out of and is based upon the contract, "Exhibit A," of said bill, the assignment or paper referred to in said 2nd subdivision of the 8th paragraph of said bill, a copy of which is hereto attached, as above stated, and "Exhibit B" of said bill, the said complainant asserting that on June 28th, 1881, when Exhibit B was executed, your petitioner agreed by parol to deliver to her $25,000 in stock of said ferry company at the end of three years, in addition to the payment provided for in "Exhibit B," as the consideration for the assignment executed by her, a copy of which is attached hereto as aforesaid, which assertion is denied by your

25 petitioner, who claims that said writings contain and state the entire consideration agreed to be paid and performed by him for such assignment.

Your petitioner further shows that the said Detroit, Belle Isle & Windsor Ferry Company is in no way interested in the controversy in this suit between your petitioner and the said complainant.

Your petitioner therefore alleges that within the meaning of section 2, act of Congress of March 3d, 1887, in this suit there is a controversy which is wholly between citizens of different States (viz., complainant, a citizen of Michigan, and your petitioner, a citizen of Missouri), and which can be fully determined as between them.

Wherefore he now comes into open court and presents this his petition and the bond required by said act of Congress for the removal of said suit to the circuit court of the United States for the eastern district of Michigan, and prays this court to accept the same

and proceed no further in the case, and that the suit be so removed.

(S'g'd) FREDERICK SCHULENBURG.

H. C. WISNER,
Solicitor for Petitioner.

STATE OF MICHIGAN, } ss:
County of Wayne, }

Personally appeared before me this 1st day of June, 1887, Frederick Schulenburg, who subscribed the foregoing petition, and made oath that he has read the same, knows its contents, and that the same is true.

(S'g'd) F. C. HARVEY,
Notary Public, Wayne Co., Michigan.

26 (EXHIBIT.)

Know all men by these presents that I, Sarah Horn, of Detroit, Michigan, for and in consideration of the sum of one dollar and of other valuable considerations to me in hand paid by Frederick Schulenburg, of St. Louis, Missouri, have assigned, sold, transferred, and set over to said Frederick Schulenburg all my interestes, claim, or demand of, in, and to six hundred shares of stock of the capital stock of the Detroit, Belle Isle & Windsor Ferry Company, which are to be delivered to me upon payment of certain moneys mentioned in a written agreement made and dated on the 27th day of June, 1881, between the Detroit Dry Dock Company and myself, and also all my interest, claim, or demand of, in, and to the moneys payable to me by said agreement, subject to the payment by said Frederick Schulenburg of the moneys by me agreed in said instrument to be paid, and to the performance by him of all the other terms and conditions of said instrument, reference being made thereto for greater certainty, and I do authorize and empower the said Frederick Schulenburg, his executors, administrators, or assigns, in my name, place, and stead, to demand and receive the said stockq, money, or other claim or interestes hereby transferred, and to otherwise enforce the performance of said agreements in all respects the same as I might have done, with power of substitution and revocation.

In witness whereof I have hereunto set my hand and seal this 28th day of June, A. D. 1881, in duplicate.

SARAH HORN. [SEAL.]

Witness:
JOHN HORN, JR.

27 The following is a copy of notice endorsed on a duplicate original of the annexed assignment, and served on the Detroit Dry Dock Company June 28th, 1881.

SARAH HORN.

Witness:
JOHN HORN, JR.

"To the Detroit Dry Dock Company:

Take notice that Sarah Horn has made an assignment to me, of which the above is a duplicate original, and I claim all the rights to the stock and moneys thereby assigned to me which Mrs. Horn was entitled to under her agreement with you, it being my intention to carry out the terms of the agreement on her part to be performed.

June 28th, 1881.

FREDERICK SCHULENBURG."

28 Know all men by these presents that Frederick Schulenburg, as principal, and George N. Brady, as surety, are held and firmly bound unto Sarah Horn in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Sarah Horn or to her certain attorney, heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, and each and every of them, firmly by these presents.

Sealed with our seals. Dated the 1st day of June, one thousand eight hundred and eighty-seven.

The condition of this obligation is such that whereas the said Sarah Horn, as complainant, has commenced against Frederick Schulenburg, the Detroit Dry Dock Company, and the Detroit, Belle Isle and Windsor Ferry Company a certain suit in the circuit court for the county of Wayne, in chancery; and whereas the said Frederick Schulenburg has filed his petition in the said circuit court for the removal of said suit to the circuit court of the United States for the eastern district of Michigan:

Now, therefore, the condition of this obligation is such that if the above-named Frederick Schulenburg shall enter or cause to be entered in the said circuit court of the United States on the 1st day of its then next session a copy of the record in said suit, and do and cause to be done such other acts as are required to be done on the removal of a suit to the said circuit court of the United States, and shall pay all costs that may be awarded by said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

(S'g'd) FREDERICK SCHULENBURG. [SEAL.]
(S'g'd) GEORGE N. BRADY. [SEAL.]

Witness:
FRED. C. HARVEY.

29 STATE OF MICHIGAN, } ss:
County of Wayne, }

George N. Brady, the surety named in the within obligation, being duly sworn, says that he is a resident of the city of Detroit and is worth the sum of two thousand dollars, over and above all his just debts, in real estate subject to execution in said county of Wayne.

(S'g'd) GEORGE N. BRADY.

Subscribed and sworn to before me this 1st day of June, 1887.

F. C. HARVEY,
Notary Public, Wayne Co., Mich.

30 At a session of the circuit court for the county of Wayne held at the court-room, in the city of Detroit, on the 2nd day of June, 1887.

Present: The Hon. Wm. Look, circuit judge.

SARAH HORN, Complainant,
vs.
FREDERICK SCHULENBURG, THE DETROIT DRY DOCK COMPANY, and The Detroit, Belle Isle & Windsor Ferry Company, Defendants.

On reading and filing the petition of Frederick Schulenburg, one of said defendants, accompanied by a proper bond, with good and sufficient surety, for the removal of this cause into the circuit court of the United States for the eastern district of Michigan, and it appearing that in this suit there is a controversy which is wholly between said complainant, as a citizen of Michigan, and said Frederick Schulenburg, as a citizen of Missouri, and which can be fully determined as between them—

On motion of H. C. Wisner, solicitor for petitioner, it is ordered that said petition and bond be, and they are hereby, accepted; that said suit be removed to the circuit court of the United States for the eastern district of Michigan, and that this court proceed no further therein.

WILLIAM LOOK,
Circuit Judge.

31 STATE OF MICHIGAN, } ss:
Wayne County, }

I, William P. Lane, register of the circuit court for the county of Wayne, in chancery, do hereby certify that the above and foregoing is a true and correct copy of the bill, subpœna, appearance, petition, and bond for removal & order of removal, being copies of all the files and proceedings entered in the above-entitled cause by said court, as appears of record in my office; that I have compared the same with the original and it is a true transcript therefrom and of the whole thereof.

[SEAL.] In testimony whereof I have hereunto set my hand and affixed the seal of said court and county at Detroit this 2nd day of June, A. D. 1887.

WM. P. LANE, *Register,*
By CHAS. KELLOGG,
Deput- Register.

32 *Order for Sale.*

In the Maritime Court of Ontario.

THE STEAMBOAT "GARLAND." No. 35.

Upon the application of the plaintiffs and upon reading the affidavit and papers filed and it appearing that no answer or demurrer has been filed in this cause, I do order and decree that the said steamboat "Garland" be appraised and sold and the proceeds thereof paid into court to answer the claims instituted or to be instituted against the said vessel.

(S'd) G. W. LOGGATT, *J. S.*

Dated at chambers this 9th day of September, A. D. 1880.

I certify the foregoing to be a true copy of the order for sale in the above cause. S. S. MACDONELL,

[SEAL.] *Deputy Registrar at Sandwich and Windsor.*

33 *Marshal's Bill of Sale of the Steamer "Garland."*

To all to whom these presents shall come, Greeting:

Know ye that I, John A. H. Campbell, deputy marshal/ of the maritime court of Ontario, Canada, by virtue of a certain order and commission of appraisement and sale bearing date the ninth day of September, A. D. 1880, issued out of and under the seal of the maritime court of Ontario, Canada (a copy of which is annexed), in a certain cause wherein Daniel B. Odette and Henry W. Wherry, petitioners, to me directed and delivered, have this day sold at public auction, after due and legal notice of the time and place of sale, according to the rules and practice of said court, the ferry steamer Garland, her boats, tackle, apparel, and furniture, to the Detroit Dry Dock Company, a body corporate under the laws of the State of Michigan, U. S., for the sum of seventeen thousand and fifty dollars ($17,050), which sum was the highest bidden, and the said Detroit Dry Dock Company being the highest bidder at such sale:

Now, therefore, I, John A. H. Campbell, deputy marshal/ as aforesaid, by virtue of the premises and in consideration of said sum of seventeen thousand and fifty dollars to me in hand paid, the receipt whereof I do hereby acknowledge, have granted, sold, transferred, and set over, and do hereby grant, sell, transfer, and set over, unto the said Detroit Dry Dock Company, its successors and assigns, the said ferry steamer or vessel called the Garland, together with her boats, tackle, apparel, furniture, and appurtenances of every kind and description whatsoever.

34 And whereas it is represented that said steamer or vessel at the time of her seizure and sale by said court was a vessel enrolled under the laws of the United States, and a copy of her enrollment is in the words and figures following, to wit:

"*Enrollment No.* 142, *Official Number* 85619. *Enrollment in Conformity to Title L.*

"Regulation of vessels in domestic commerce of the Revised Statutes of the United States.

"Sarah Horn, of Detroit, Michigan, having taken and subscribed the oath required by law, and having sworn that she is a citizen of the United States, sole owner of the ship or vessel called the 'Garland,' of Detroit, whereof George D. Horn is at present master and as he hath sworn is a citizen of the United States, and that the said ship or vessel was built at Detroit, Michigan, while in the year 1880, as appears by her E. No. 138, dated Detroit, June 5th, 1880, surrendered this on change of owner, and said enrollment having certified that the said ship or vessel has one deck and no mast, and that her length is $107\frac{2}{100}$ feet, her breadth $29\frac{4}{100}$, —, her depth $11\frac{7}{100}$ feet, her height — feet; that she measures 248 and $\frac{21}{100}$ tons, viz., capacity under tonnage deck, —; $186\frac{3}{100}$ tons capacity between decks above tonnage deck; capacity of inclosures on main deck, viz., $62\frac{23}{100}$ tons; total tonnage, $248\frac{26}{100}$ tons; that the following-described spaces and no others have been omitted, viz., and that she is a steam ferry, has a plain head and a round stern; and the said Sarah Horn having agreed to the description and measurement above specified, and sufficient security having been given according to the said title, the said ship or vessel has been duly enrolled at the port of Detroit.

"Given under my hand and seal at the port of Detroit, in the district of Detroit, this 8th day of June, in the year one thousand eight hundred and eighty.

"(Signed) J. C. PARRY,
"*By Coll. of Customs.*"

35 Now, therefore, I, J. A. H. Campbell, deputy marshall as aforesaid, by virtue of the premises and in consideration of said sum of seventeen thousand and fifty dollars to me in hand paid, the receipt whereof I do hereby acknowledge, have granted, sold, transferred, and set over, and do hereby grant, sell, transfer, and set over, to the said Detroit Dry Dock Company, its successors and assigns, the said vessel, called the "Garland," her boats, tackle, apparel and furniture, and appurtenances of every kind and description whatsoever; to have and to hold the said steamer or vessel, together with other the above-described premises, unto it, the said Detroit Dry Dock Company, its successors and assigns, to its sole and only proper use, benefit, and behoof forever, as fully and amply in all respects as I, the said deputy marshall, by virtue of the said order and commission aforesaid, may or ought to grant, sell, transfer, and set over the said steamer or vessel, with the premises aforesaid.

In witness whereof I, the said deputy marshall as aforesaid, have

hereunto set my hand and seal this fifteenth day of September, in the year of our Lord one thousand eight hundred and eighty.

J. A. H. CAMPBELL, [SEAL.]
Deputy Marshall, Maritime Court of Ontario, Canada.

Signed, sealed, and delivered in presence of—
O. E. FLEMING.
DUNCAN DOUGALL.

36 CANADA, ONTARIO, }
Town of Windsor. }

On this fifteenth day of September, A. D. one thousand eight hundred and eighty, before me, the subscriber, personally came John A. H. Campbell, deputy marshall of the maritime court of Ontario, to me known to be the same person described in and who executed the above bill of sale, and acknowledged that he executed the same freely for the uses and purposes therein set forth.

DUNCAN DOUGALL,
[SEAL.] *Notary Public, P. M. of Ontario, Canada.*

37 "EXHIBIT."

For a valuable consideration to me in hand paid by Sarah Horn, owner of the steamer Garland, I hereby acknowledge satisfaction of all claims and demands of every name and nature which I may have against said Sarah Horn personally or as administrator of the several persons drowned July 22nd, 1880, through a collision between said steamer Garland and steamer Mamie or which I may have against said steamer or persons who have become interested in said steamer since said collision.

JAMES H. CUDDY,
Personally and as Administrator.

Detroit, March 17, 1886.

38 "EXHIBIT."

For a valuable consideration to us in hand paid we hereby acknowledge satisfaction of all claims and demands of every name and nature which we or either of us may have from the beginning of the world up to the present time against the Detroit Dry Dock Company, the Detroit River Ferry Company, the Detroit, Windsor & Belle Isle Ferry Company, Alexander McVittie, Albert Schulenburg, or Frederick Schulenburg, or any of them.

JOHN HORN, JR.
SARAH HORN.

Detroit, Mar. 17, 1886.

39 *Copies of Stipulations.*

The United States Circuit Court for the Eastern District of Michigan.

SARAH HORN
vs.
FREDERICK SCHULENBURG. } No. 7128.

It is hereby stipulated that the bill of exceptions settled and filed in this cause shall be withdrawn, and that the judgment entered herein in favor of defendant shall stand as the final determination of the issue, and that full satisfaction of the same for costs may be entered.

JNO. ATKINSON,
Att'y for Pl'ff.
H. C. WISNER,
Att'y for Def't.

March 17, 1887.

40 The Supreme Court of the United States.

JAMES H. CUDDY, Administrator, etc., Appellant,
vs.
THE STEAMER GARLAND; THE DETROIT RIVER FERRY CO., Claimant.

It is hereby stipulated that the appeal in this cause may be dismissed.

ALFRED RUSSELL,
Att'y for Appellant.
H. C. WISNER,
Att'y for Claimant.

Detroit, March 17, 1886.

41 The Circuit Court of the United States for the Eastern District of Michigan.

JAMES H. CUDDY, Adm'r, Appellant,
vs.
STEAMER GARLAND; THE DETROIT RIVER FERRY CO., Claimant.

It is stipulated that full satisfaction of the decree for costs in favor of said claimant and appellant may be entered in this cause.

ALFRED RUSSELL,
Proctor for Appellant.
H. C. WISNER,
Proctor for Claimant and Appellee.

Detroit, March 17th, 1886.

42 The Superior Court of Detroit.

JAMES H. CUDDY, Administrator,
vs.
SARAH HORN, Prin. Def't; THE DETROIT DRY DOCK Co. and FREDERICK SCHULENBURG, Garnishee Def'ts.

It is hereby stipulated that full satisfaction of judgment may be entered in this cause.

JNO. ATKINSON,
Att'y for Pl'ff.

Nos. 4405, 4406, 4407, 4408, *4408*, 4409, 4410, 4412, 4413, 4414, 4415, 4416, 4417.

It is hereby stipulated that each of the above-numbered cases may be discontinued without costs to either party.

JNO. ATKINSON,
Att'y for Pl'ff.
I. T. COWLES,
Att'y for Def't.

43 United States District Court for the Eastern District of Michigan. In Admiralty.

JAMES H. CUDDY, Administrator, etc.,
vs.
STEAMER GARLAND.

JAMES H. CUDDY
vs.
STEAMER GARLAND.

THOMAS H. DORAN
vs.
STEAMER GARLAND.

BARTHOLOMEW DONOVAN
vs.
SAME.

DANIEL TOOMEY
vs.
SAME.

LAWRENCE NOLAN
vs.
SAME.

MICHAEL KELLY
vs.
SAME.

44

ELIZABETH MONAHAN
vs.
SAME.

PETER HOIRA
vs.
SAME.

WILLIAM COSGROVE
vs.
SAME.

ANTHONY McLOGAN
vs.
SAME.

JOSEPH GREUSEL
vs.
SAME.

FREDERICK MARTIN
vs.
SAME.

It is hereby stipulated that the libels and intervening libels in all the above cases may be dismissed and the bond on stipulation filed for said steamer Garland cancelled and surrendered up.

ALFRED RUSSELL,
Proctor for Libellants.
WISNER & SPEED,
Proctors for Claimants.

Detroit, March 17, 1886.

45 The Superior Court of Detroit. In Chancery.

SARAH HORN
vs.
THE DETROIT DRY DOCK COMPANY, THE DETROIT, Belle Isle & Windsor Ferry Co., & Frederick Schulenburg. } No. 1789.

It is hereby stipulated that an order may be made and entered in the above cause dismissing the bill and discontinuing the same without costs to either party.

JNO. ATKINSON,
Sol'r for Compl't.
H. C. WISNER,
Sol'r for Def'ts.

46 At a session of the superior court of Detroit held, etc., March 18, 1886.

Present: J. Logan Chipman, judge.

SARAH HORN
vs.
THE DETROIT DRY DOCK COMPANY, THE DETROIT, BELL ISLE & WINDSOR FERRY COMPANY, & FREDERICK SCHULENBURG.

On reading and filing the stipulation of the respective solicitors in this cause it is ordered that this cause be, and the same is, discontinued without costs to either party.

J. LOGAN CHIPMAN,
Judge of the Superior Court of Detroit.

47 ("EXHIBIT MCVITTIE 1.")

Agreement in Duplicate.

Know all men by these presents that I, Sarah Horn of Detroit, Michigan, for and in consideration of the sum of one dollar and of other valuable considerations, to me in hand paid by Frederick Schulenburg of St. Louis, Missouri, have assigned, sold, transferred and set over and do hereby assign, sell, transfer and set over to said Frederick Schulenburg all my interest, claim or demand of, in and to six hundred shares of stock of the capital stock of the Detroit, Belle Isle and Windsor Ferry Company, which are to be delivered to me upon payment of certain moneys mentioned in a written agreement made and dated on the twenty-seventh day of June, 1881, between the Detroit Dry Dock Company and myself, and also all my interest, claim or demand of, in and to the moneys payable to me by said agreement subject to the payment by said Frederick Schulenburg of the moneys by me agreed in said instriment to be paid to the performance by him of all the other terms and conditions of said instrument reference being made thereto for greater certainty, and I do authorize and empower the said Frederick Schulenburg, his executors, administrators or assigns in my name, place and stead to demand and receive the said stock, money or other claim or interest hereby transferred and to otherwise enforce the performance of said agreement in all respects the same as I might have done, with power of substitution and revocation.

In witness whereof I have hereunto set my hand and seal this twenty-eighth day of June, A. D. 1881 in duplicate.

SARAH HORN. [SEAL.]

Witness:
JOHN HORN, JR.

48 To the Detroit Dry Dock Company:

Take notice that Sarah Horn has made an assignment to me, of which the above is a duplicate original, and I claim all the rights to the stock and moneys thereby assigned to me which Mrs.

Horn was entitled to under her agreement with you, it being my intention to carry out the terms of the agreement on her part to be performed.

June 28th, 1881.

FREDERICK SCHULENBURG.

49 EXHIBIT A.

Memorandum of agreement between the Detroit Dry Dock Company, party of the first part and Sarah Horn, party of the second part witnesseth as follows:

Whereas Sarah Horn was the owner of the steamers Excelsior and Garland; that on the first day of April, 1880 a mortgage was made by her to the Detroit dry dock engine works on the steamer Excelsior for $16,000 and interest at ten per cent. on which there was due May 10th, 1881, ten thousand one hundred and forty-three dollars which sum has been assumed and paid by the Detroit Dry Dock Company; that on the fifth of June, 1880 a mortgage on said steamer Garland was made by Sarah Horn to the Detroit Dry Dock Company for twelve thousand five hundred dollars and interest at ten per cent. and subsequently on the 11th day of September, 1880 a mortgage was made by said Sarah Horn to said dry dock company for twelve thousand five hundred dollars on said steamer Excelsior; that by said last mortgage it was intended to secure the payment of the same debt secured by said mortgage on the Garland and such advances as might be made by said dry dock company to or for the account of Sarah Horn; that on the 17th of August, 1880 said steamer Garland was attached by warrant issued by the maritime court at Ontario at the suit of Messrs. Odette & Wherry, and she was sold under the proceedings so commenced and by the order of said court on the 14th day of September, 1880 to the Detroit Dry Dock Company for the sum of seventeen thousand and fifty dollars; that on the 16th day of September, 1880 said Detroit Dry Dock Company conveyed said steamer Garland to the Detroit River Ferry Company; that on the 21st day of September, 1880 said steamer Excelsior was sold by said Sarah Horn to John Horn, Jr., and on
50 the 24th day of November, 1880 under an execution issued out of the circuit court for the county of Wayne, on a judgment recovered by John H. Kaple, executor of the estate of Marcus Stevens, deceased, against said John Horn, Jr. said steamer Excelsior was sold to Alexander McVittie for the sum of five hundred and five dollars, and on the 25th day of November, 1880 said steamer Excelsior was conveyed by said Alexander McVittie to the Detroit River Ferry Company for the sum of five hundred and fifty dollars; that the said Detroit Dry Dock Company for the purpose of protecting itself and making its property in said steamers Garland and Excelsior more valuable, also purchased in the name of the Detroit River Ferry Company, the steamer Fortune for twenty-eight thousand six hundred dollars; that on the 10th day of May, 1881, said steamers Garland, Excelsior and Fortune were conveyed by said Detroit River Ferry Company to the Detroit, Belle Isle and Wind-

sor Ferry Company, a corporation formed to unite the interests of said Detroit River Ferry Company with those of the Detroit and Windsor Ferry Company, and stock of said Detroit, Belle Isle and Windsor Ferry Company, for the consideration of such sale, viz: eighty-three thousand dollars, was issued to John Owen, R. P. Toms, Stephen R. Kirby and Alexander McVittie in trust for said Detroit Dry Dock Company, the stock of said Detroit River Ferry Company having been held and owned by said dry dock company; that there is now pending in the district court of the United States for the eastern district of Michigan, in admiralty, suits against said steamer Garland, brought by James H. Cuddy, and other- for damages claimed to have been sustained by a collision between the said steamer Garland and the yacht Mamie on the 22nd day of July last; that the Detroit Dry Dock Company has filed a petition in said maritime court of Ontario for recovery against the steamer Garland of
51 the amount payable upon the said mortgage of said company of June 5th, 1880, and the payment thereof is opposed by certain persons claiming damages sustained by the said collision between said Garland and the yacht Mamie, who are also prosecuting suits against said Garland in said maritime court of Ontario, and all which suits now remain undetermined.

And whereas said Sarah Horn has expressed a decire to purchase a part of said stock, and said Detroit Dry Dock Company in view of the matters aforesaid and of its past business relations with said Sarah Horn is now disposed to deal generously with said Sarah Horn by making a favorable sale to her of part of said stock, although it does not admit she has any legal claim upon said company in respect thereto;

Now this agreement witnesseth that the said party of the first part hereby agrees to sell and deliver to said party of the second part, her executors, administrators or assigns, six hundred shares of the capital stock of the Detroit, Belle Isle and Windsor Ferry Company, each of the par value of one hundred dollars, issued as aforesaid; and second, will advance and pay to Messrs. Wisner & Speed their disbursements, expenses, paid or to be paid out or expended, and their charges for services rendered or to be rendered by them in the suits in the district court aforesaid, and in the maritime court of Ontario against said Garland, in the Supreme Court of the United States on application of the Detroit River Ferry Company for a writ of prohibition, in the Wayne county circuit court, in case of The People *vs.* George D. Horn, in the superior court of Detroit in cases of James H. Cuddy, administrator, etc., against Sarah Horn *et al.*, in the supreme court of Michigan on error to said superior court, and also for attendance and services on investigation of said collision before the United States steamboat inspectors and be-
52 fore the coroner's jury, and for their services, expenses and disbursements in any other matter or suit which has arisen or may arise out of said collision; and third, will also pay to said party of the second part (or apply on her indebtedness, if any part remains unpaid) whatever sums of money that may be paid to said company by said maritime court of Ontario out of the proceeds of

the said sale of said steamer Garland after deducting costs and expenses of the litigation in said court or otherwise.

And in consideration of the agreements aforesaid, said party of the second part hereby agrees to pay to said party of the first part, its successors and assigns the sum of fifty-one thousand dollars within three years from the date hereof with annual interest at the rate of ten per cent. per annum, and also any sum or sums of money that may be paid by said part- of the first part to Wisner & Speed as aforesaid and any sums or sums of money that may be paid by said party of the first part on any decree or decrees that may be rendered by said district court of the United States or by the circuit court of the United States upon appeal against said steamer Garland or against the stipulators upon any stipulation or bond given or to be given in said suits in said district court, and any costs, expenses or charges that said party of the first part may pay, pay out or disburse in respect to said suits or other suits commenced of to be commenced in said district court or elsewhere against said steamer Garland, growing out of said collision with said Mamie, to recover the same damages sought to be recovered in the suits pending at the date of this instrument; the said sums so paid to Wisner & Speed and upon any decree or decrees of for costs, charges or expenses in said suits to be added to and form part of the indebtedness of said party of the second part to be paid within three years from
53 the date hereof (if said litigation is concluded or if not then within thirty days after the same is concluded) with annual interest at the rate of ten per cent. per annum. The said six hundred shares of stock to be delivered upon payment of the sums herein agreed by said party of the second part to be paid, and if said party of the second part should fail to pay any part of the moneys agreed to be paid, said party of the first part may sell enough of the said stock to pay the same but at not less than for its par value, nor upon less than ten days' notice to the said party of the second part. It is understood that so much of the stock of said Detroit, Belle Isle and Windsor Ferry Company shall be delivered to said party of the second part as shall be equitable upon payments made to apply on the indebtedness by her herein agreed to be paid.

And it is further agreed that any dividends received by said party of the first part upon said stock shall be applied upon the said indebtedness of the party of the second part herein agreed to be paid.

And the said Sarah Horn in consideration of said agreement of said Detroit Dry Dock Company does hereby release, discharge, convey and quitclaim any and all interest, claim or demand of any kind or nature whatsoever she may have or pretend or claim to have against said Detroit Dry Dock Company, to either of said boats or to the earnings or the proceeds of sale thereof received or to be received by said Detroit Dry Dock Company or by either of said ferry companies.

It is expressly agreed by and between the parties hereto that this agreement shall apply to and bind their respective executors, administrators, successors and assigns.

In witness whereof the parties to these presents have executed

the same in duplicate, and the said Sarah Horn has exe-
54 cuted the same under her hand and seal, and the Detroit Dry Dock Company has affixed its corporate seal and caused the same to be subscribed by its secretary, this twenty-seventh day of June, A. D. 1881.

Attest: A. McVITTIE, *Sec.* [SEAL.]
SARAH HORN. [SEAL.]

Witness:
JOHN HORN, JR.

55 *Order for Cause to be Entered.*

At a session of the circuit court of the United States for the eastern district of Michigan contin-ed and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday, the seventh day of June, in the year one thousand eight hundred and eighty-seven.

Present: The Hon. Henry B. Brown, district judge.

SARAH HORN *vs.* THE DETROIT DRY DOCK COMPANY, The Detroit, Belle Isle & Windsor Ferry Company, and Frederick Schulenburg.	In Equity. Case Removed from Wayne County. No. 3164.

Now comes the defendant Frederick Schulenburg, by H. C. Wisner, his solicitor, and files in this court copies of all papers filed and proceedings had and entered in the circuit court for the county of Wayne, in chancery; and thereupon, on motion of the said attorney for said defendant, it is ordered that this cause be, and the same is hereby, entered in this court as of this day.

56 *Plea of Frederick Schulenburg.*

The plea of Frederick Schulenburg, defendant, to the bill of complaint of Sarah Horn.

To the United States Circuit Court for the Eastern District of Michigan. In equity.

This defendant, no- confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true, for plea to the whole of said bill, saith—

1. That on the 17th day of August, 1880, the steamer Garland, then owned by said complainant, was seized at Windsor, Ontario, under process issued by the maritime court of Ontario, a court of general admiralty jurisdiction, on a libel filed against her (*in rem*) for supplies, which under the law of said court constituted a maritime lien upon her, and, so being in custody, she was on the 15th day of September, 1880, duly sold by an order of said court, according to its rules, at auction, and purchased by the Detroit Dry Dock

Company for itself and duly conveyed on the 15th day of September, 1880, in accordance with said purchase.

2. That, as stated in said bill, a large number of suits—to the number of thirteen—subsequently to July 22nd, 1880, were commenced by one James H. Cuddy, as administrator, and Alfred Russell, Esq., as his proctor, in the district court of the United States for this district, against said steamer Garland, to recover damages for the loss of life occasioned by the collision mentioned in said bill, and on the 6th day of November, 1880, said steamer was seized at Detroit by the marshal of this district upon process issued in said suits, and, being in custody, she was duly appraised and bonded by and under the claim of the Detroit River Ferry Company,
57 formed by the officers of said Detroit Dry Dock Company for the purpose, and to whom said dry dock company had since its purchase sold and conveyed the same.

3. That said causes were put at issue, and on March 5th, 1883, one of them was duly brought on to be heard upon pleadings and proofs, duly tried, and a decree made by said district court dismissing the libel with costs, from which decree the libellant, Cuddy, appealed to the circuit court of the United States, which court, on hearing *on* pleadings and proofs — said decree, on November 21st, 1883, duly affirmed and a decree for costs rendered in favor of said claimant, which were duly taxed at the sum of $345.36; that from the decree of said circuit court said libellant appealed to the Supreme Court of the United States.

4. That on October 14th, 1880, the said James H. Cuddy, as administrator of the estates respectively of the persons lost by said collision, commenced thirteen suits at law in the superior court of Detroit against said complainant, as owner of said steamer Garland at the time of said collision, and the owners of the steamer Mamie to recover the same damages as claimed in the admiralty cases before mentioned, which thirteen suits are numbered and known on the records of said superior court respectively as 4405, 4406, 4407, 4408, 4409, 4410, 4411, 4412, 4413, 4414, 4415, 4416, 4417, and all of which were duly put at issue according to the rules of said court, said plaintiff being represented therein by Wisner & Speed as her attorneys and plaintiff Cuddy by Alfred Russell as his attorney.

5. That on December 3d, 1883, the said complainant, by H. C. Wisner, as proctor, presented her petition to the district court of the United States for this district for a limitation of her liability as owner of said steamer Garland and alleged therein the pend-
58 ency of said suits in said superior court of Detroit, to which the said James H. Cuddy answered, through Alfred Russell, as proctor, and subsequently and on February 22nd, 1885, said matter was brought on to be heard and submitted for decision.

That subsequently the judge of said court decided said matter, granting the prayer of said petition, and handed down, signed, a decree limiting her liability as owner of said steamer at the time of such collision to the sum of $60.00, but the said Sarah Horn appeared by John Atkinson, as attorney, and withdrew her said petition and refused to accept the benefits of said decree.

6. That upon the filing of said petition for a limitation of liability as aforesaid the said Sarah Horn, by her said attorneys, Wisner & Speed, interposed in each of the cases so pending against her in the superior court of Detroit a plea *puis darrien continuance*, alleging said proceedings as a bar to the further prosecution of said suits in that court, and the plaintiff in said suits, except case No. 4410, failing to reply to said plea as required by the rules of practice in that court, on Jan. 24th, 1884, his default was entered in each case, made absolute on Jan'y 29th, 1884, and a judgment entered in favor of said Sarah Horn for costs in each of said cases.

7. That all of the aforesaid litigation arose directly out of the collision of July 22nd, 1880, before mentioned.

8. That on August 6th, 1884, the said Sarah Horn, by John Atkinson, her attorney, commenced suit against this defendant at law in this court which, when afterwards brought to trial, resulted in a verdict being rendered in favor of defendant by direction of the court, as stated in paragraph 11 of said bill, and upon which verdict a judgment was entered for costs against said Sarah Horn and in favor of said Frederick Schulenburg.

59 9. That on January 20th, 1886, the said complainant, Sarah Horn, by John Atkinson, as her solicitor, commenced a suit for the same cause of action as in this case by filing a bill of complaint in the superior court of Detroit, in chancery, the said court having full jurisdiction of the premises, against The Detroit Dry Dock Company, The Detroit, Belle Isle & Windsor Ferry Company, and Frederick Schulenburg; process was duly issued thereon and served upon all of said defendants, who duly appeared in said cause; that the bill of complaint so filed by complainant was in every particular, in allegations and prayers for relief except paragraph 14, the same as the bill in this cause; that said excepted paragraph 14 of said bill alleged—

"That of the suits commenced against the said steamer Garland in the district court of the United States in admiralty two have been tried and have been decided in your oratrix' favor, and your oratrix is ready and willing to secure the said Frederick Schulenburg and the said Detroit Dry Dock Company against all liability on account of the other suits pending in said court; that all fees of every kind due by your oratrix to the said Wisner & Speed have been fully paid and they have ceased to act for her, so that there is no further liability to them on behalf of your oratrix, and which differs from paragraph 14 of the bill in this cause, as appears from said paragraph 14."

10. That on April 10th, 1885, in the suits at law referred to in paragraph 4 of this plea, John Atkinson was substituted as attorney for plaintiff in place of Alfred Russell, and I. T. Cowles, a clerk in said Atkinson's office, at the request of Sarah Horn, was substituted as her attorney in place of Wisner & Speed; that said substitution of attorneys having been so made, on April 21st, 1885, by consent of said Sarah Horn, a judgment was entered against her in

60 favor of said plaintiff Cuddy for $15,000 damages and $270

costs in case 4410 aforesaid, and by stipulation of said attorneys all defaults in the other cases were set aside.

That, judgment being entered as aforesaid in case 4410, on the same day said plaintiff filed affidavits in said cause separately against the Detroit Dry Dock Company and Frederick Schulenburg as garnishee debtors of the said Sarah Horn; writs of garnishment were thereupon duly issued out of said court and served on said parties, who appeared and filed their disclosures thereto.

That the foundation of said garnishment proceedings was the same and was based upon the same claim of indebtedness from said parties to Sarah Horn as is the foundation for and claim of indebtedness in this case.

11. That all the aforesaid pending litigation being then pending and the judgments and decrees for costs aforesaid being then in full force and wholly unsatisfied, on March 11th, 1886, the issue in said garnishee proceedings against the Detroit Dry Dock Company came on to be tried before a jury duly empaneled, and said trial continued in progress on the 12th, 15th, 16th, and 17th days of March, when on said 17th of March and during said trial all of said parties got together and then and there entered into a full and complete adjustment and settlement of all claims and demands and of all said litigation and all the conditions of said agreement were then and there performed, and in pursuance thereof there was then and there paid, on behalf of said Detroit Dry Dock Company and Frederick Schulenburg, to and received by John Atkinson, the attorney of said James H. Cuddy and Sarah Horn, in said settlement the sum of $3,00– agreed to be paid; stipulations were signed and delivered discharging all of said judgments and decrees and for the
61 discontinuance without costs of all of said suits pending as aforesaid, and the said Cuddy and the said Sarah Horn then and there executed and delivered receipts or acquittances in the words and figures following, viz:

"For a valuable consideration to me in hand paid by Sarah Horn, owner of the steamer Garland, I hereby acknowledge satisfaction of all claims and demands of every name and nature which I may have against said Sarah Horn, personally or as administrator of the several persons drowned July 22nd, 1880, through a collission between said steamer Garland and steamer Mamie, or which I may have against said steamer or persons who have become interested since said collision.

Detroit, March 17, 1886.

JAMES H. CUDDY,
Personally and as Administrator."

"For a valuable consideration to us in hand paid we hereby acknowledge satisfaction of all claims and demands of every name and nature which we or either of us may have from the beginning of the world up to the present time against the Detroit Dry Dock Company, the Detroit River Ferry Company, the Detroit, Windsor

and Belle Isle Ferry Company, Alexander McVittie, Albert R. Schulenburg, or Frederick S-hulenburg or any of them.

Detroit, March 17, 1886.

JOHN HORN, JR.
SARAH HORN."

As by the said receipts now in the possession of the defendant and ready to be produced to this honorable court will appear.

62 That said stipulations were thereupon duly filed in the respective courts, and the aforesaid suits in the district court of the United States, in admiralty, in the Supreme Court of the United States, in the superior court of Detroit, at law and in chancery, were all discontinued without costs and satisfaction of judgments and decree in this court in favor of this defendant and the claimant of said steamer for costs, and in the superior court of Detroit in favor of said Cuddy for damages and costs, as aforesaid, were duly entered.

Therefore this defendant pleads the said settlement and release in bar to the whole of said complainant's bill, as hereinbefore particularly mentioned, and prays the judgment of this honorable court whether he should make any further answer to said bill; and he prays to be hence dismissed with his costs.

H. C. WISNER,
Solicitor for Defendant.

STATE OF MICHIGAN, }
Eastern District of Michigan, County of Wayne, } ss:

Frederick Schulenburg, being duly sworn, says that the foregoing plea is true in point of fact, and the same is not interposed for delay.

FREDERICK SCHULENBURG.

Subscribed and sworn to before me this 15th of June, 1887.

FRED. C. HARVEY,
Notary Public, Wayne County.

I hereby certify that, in my opinion, the foregoing plea is well founded in point of law.

D. C. HOLBROOK, *Counsel.*

Filed June 15th, 1887.

WALTER S. HARSHA, *Clerk.*

63 *Plea and Answer.*

To the Circuit Court of the United States for the Eastern District of Michigan. In Equity.

The plea and answer of the Detroit Dry Dock Company, defendant, to the bill of complaint of Sarah Horn, complainant.

As to so much of and such parts of the complainant's bill as charges that this defendant holds 175 shares of stock in the Detroit, Belle Isle & Windsor Ferry Company or is interested therein this

defendant pleads thereto, and for plea saith that prior to the filing of said bill, Frederick Schulenberg having performed in all things the covenants and conditions in the agreement set forth as Exhibit A to said bill, as assignee of said complainant under the assignment set forth as Exhibit B of said bill, it had delivered every share and all of said stock to the said Frederick Schulenberg, and this defendant avers that for a long time prior to the filing of said bill it had not, nor had it at that time, nor has it now in its hands or under its control any of said stock nor any claim or interest in or to any of said stock or any part thereof, and that said complainant has not right to institute this or any other suit against it in respect thereof.

All which said matters and things this defendant doth aver and plead in bar to so much of the said complainant's bill as hereinbefore particularly mentioned and pleaded to.

And this defendant, not waiving its said plea, for answer to so much of said bill as aforesaid saith that it admits that on or about June 28th, 1881, Frederick Schulenberg presented to it said complainant's transfer and received all said stock except 175 shares, but it denies that it still holds 175 shares of stock, and alleges
64 that it delivered the same to said Schulenberg long prior to the commencement of this suit, since when it has had no interest or claim in, upon, or to said stock or any part thereof.

And this defendant prays the judgment of this court whether it ought to be compelled to make any further or other answer to said bill or any part thereof, and it prays to be hence dismissed with its costs.

DETROIT DRY DOCK CO.,
By A. McVITTIE, *Secretary.*

H. C. WISNER,
Solicitor for Def't.

STATE OF MICHIGAN, }
Eastern District of Michigan, County of Wayne, } *ss:*

Alexander McVittie, being duly sworn, says that he is the secretary of the Detroit Dry Dock Company and is personally cognizant of the matters set forth in the foregoing plea of said company, and that said plea is true in point of fact. Deponent further says that said plea is not interposed for delay.

ALEXANDER McVITTIE.

Subscribed and sworn to before me this 15th day of June, 1887.
FRED. C. HARVEY,
Notary Public, Wayne Co., Mich.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

D. C. HOLBROOK, *Counsel.*

Filed June 15, 1887.

WALTER S. HARSHA, *Clerk.*

65 *Replication to Plea of Def't Schulenburg.*

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Michigan.

SARAH HORN, Complainant,
vs.
FREDERICK SCHULENBURG, THE DETROIT DRY DOCK Company, The Detroit, Belle Isle & Windsor Ferry Company, Defendants. } In Equity.

The replication of Sarah Horn, the complainant, to the plea of the defendant Frederick Schulenburg.

This repl*ai*nt, saving and reserving to herself, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be taken to the manifold insufficienc-es of the said plea, for replication thereunto says that she will aver, maintain, and prove her bill of complaint to be true, certain, and sufficient in the law to be ans-ered unto, and that the said plea is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatever in the said plea contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; al- which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by her said bill she has already prayed.

F. A. BAKER,
Solicitor for Complainant.

Filed June 20, 1887.

WALTER S. HARSHA, *Clerk.*

66 Circuit Court of the United States for the Eastern District of Michigan. In Equity.

SARAH HORN, Complainant,
vs.
FREDERICK SCHULENBURG, THE DETROIT DRY DOCK COMPANY, and The Detroit, Belle Isle & Windsor Ferry Company, Defendants.

Testimony taken before Herschel Whitaker, standing examiner, on behalf of the defendant Schulenburg, in support of his plea to the bill.

Appearances: Mr. F. A. Baker, solicitor for complainant; Mr. H. C. Wisner, solicitor for defendants.

Mr. WISNER: I offer in evidence a bill of sale, executed by the marshal of the maritime court of Ontario to the Detroit Dry Dock Company, of the steamer Garland.

Objected to on the ground that the maritime court of Ontario had no jurisdiction to sell the property and no title was conveyed by it.

The bill of sale is marked by the examiner "Exhibit A."

Mr. WISNER: I now offer in evidence the files, calendar entries, and journal entries of the United States district court for the eastern district of Michigan in the cases of Cuddy, administrator, *vs.* The Steamer Garland, being file No. 2465.

67 It is agreed between counsel that upon the hearing of this cause such of these papers as either party may wish to use may be used upon the trial, and the identification of the files and records to be offered in evidence is waived.

Mr. WISNER: I offer in evidence the files, calendar entries, and journal entries of the United States circuit court for the eastern district of Michigan in the case of Cuddy, appellant, *vs.* The Steamer Garland, being file No. 6865.

I now offer in evidence, from the clerk's office of the circuit court for the county of Wayne, the files, calendar entries, and journal entries of the superior court of Detroit in the cases of Cuddy, administrator, *vs.* Sarah Horn *et al.*, being file No. 44045 to 4417, inclusive.

I offer in evidence the files, calendar entries, and journal entries of the U. S. district court for the eastern district of Michigan in the matter of the petition of Sarah Horn for limitation of liability as owner of the steamer Garland, being file No. 2830.

Complainant's counsel admits the truth of the allegation of paragraph 7 of plea in this case.

Mr. WISNER: I offer in evidence the files, calendar entries, and journal entres of the circuit court of the United States for the eastern district of Michigan in the case of Sarah Horn *vs.* Frederick Schulenburg, being file No. 7128.

I also offer in evidence the files, calendar entries, and journal entries of the superior court of Detroit, in chancery, in the case of Sarah Horn *vs.* The Detroit Dry Dock Co., The Detroit, Belle Isle & Windsor Ferry Co., and Frederick Schulenburg, from clerk's office of the Wayne county circuit court, being file No. 1789.

68 ALEXANDER MCVITTIE, a witness produced on behalf of the defendants, being first duly sworn, testified as follows:

Examined by Mr. WISNER:

Q. You are the secretary of the Detroit Dry Dock Company?
A. I am.
Q. How long have you held that position?
A. Since 1872.

Q. Are you acquainted with all the parties to this litigation?
A. I am.
Q. You know of the pendency of the suits that have been referred to?
A. I do.
Q. Do you recollect the pendency of the suit in the superior court, in chancery, by Sarah Horn *vs.* the dry dock company, the ferry company, and Schulenburg?
A. I do.
Q. Do you recollect what that suit was for; what the basis of the claim as it appeared by the bill of complaint was?
A. Based on the contract.
Q. I didn't ask you what it was; I asked you if you recollected it.
A. I do.
Q. Do you recollect of the pendency of the garnishment proceedings in the suit of Cuddy *vs.* Sarah Horn?
A. I do.
Q. Will you state what the claim of the plaintiff in the garnishment suit that was tried or partly tried was based on?
A. It was based upon a contract that the dry dock company had made for the sale of ferry stock to Mrs. Horn.
Q. Do you recollect the date of that contract?
69 A. I do not.

A paper shown to the witness, and he is asked:

Q. See if that will refresh your recollection.
A. June, 1881.
Q. Will you state whether this contract that you speak of was used upon the trial of that cause in evidence—whether you recollect it?
A. I think it was.
Q. Look at the papers I hand you and state whether those papers which you hold in your hand make the contract that you referred to in answer to my direct question.
A. They do.
Q. Do you know the handwriting of the parties?
A. I do.
Q. That is your handwriting, Mr. McVittie (pointing to the paper)?
A. It is.
Q. The handwriting of Sarah Horn also?
A. Of Sarah Horn.
Q. The signature of Sarah Horn?
A. It is.
Q. And John Horn, Jr.?
A. Yes, sir.
Q. And the signature of Frederick Schulenburg, is it?
A. Yes.

The paper is offered in evidence and is marked by the examiner "McVittie one."

Q. Do you recollect when the trial in the superior court of the garnishment proceedings commenced?

A. Do I recollect the date?

Q. The day of the month.

70 A. It was in March, 1886. I don't know the day of the month.

Q. How many days were you occupied in the trial until it stopped?

A. I could not state positively.

Q. To the best of your recollection; it is not very important.

A. As much as three or four days.

Q. Were you present all the time?

A. I think I was.

Q. Will you state whether the trial proceeded to a verdict from the jury?

A. It did not.

Q. What became of it?

A. A settlement was made by the parties.

Q. In that settlement did you take any part?

A. I took an active part.

Q. Who acted with you in the settlement?

A. Col. Atkinson.

Q. As representing whom?

A. Representing Mrs. Horn.

Q. Who else?

A. And the Cuddy claimants.

Q. And who did you represent?

A. I represented the dry dock company and Frederick Schulenburg.

Q. Will you state whether anything was paid by you, representing the parties you have spoken of, as the consideration for the settlement?

A. I paid $3,000.

Q. To whom?

A. To Col. Atkinson; a check to his order.

Q. And upon the payment of that money did you receive from Col. Atkinson any papers? Look at these papers (handing papers to witness).

71 A. I received those papers.

Q. By whom were they executed?

A. By James H. Cuddy personally and as administrator.

Q. One moment. One of them is so executed. That is an independent paper, is it not?

A. Yes, sir.

Q. The other one is executed by whom?

A. John Horn, Jr., and Sarah Horn.

Q. And in whose handwriting is all these papers?

A. I think Col. Atkinson; I am not sure.

The papers identified by witness in his last answer are offered in evidence and marked by the examiner "Exhibit McVittie 2."

Q. Do you know anything about stipulations being drawn and executed disposing of all the depending litigations?

A. I do.

Q. What do you know about it?

A. I know that such papers were executed and all the suits growing out of that collision were withdrawn.

Q. Will you state what sum was agreed upon between Col. Atkinson and yourself in that negotiation for that settlement?

A. $3,000 was the sum agreed upon and the sum paid.

Q. The amount that was paid?

A. The amount that was paid.

Cross-examination.

By Mr. BAKER:

Q. Was that the exact amount that was paid?

A. The exact amount; yes, sir.

Q. By a check drawn by you?

A. Yes, sir.

Q. Individually?

72 A. The check of the Detroit Dry Dock Company, but signed by me—signed by me as secretary and treasurer.

Q. That was drawn payable to Col. Atkinson individually?

A. To Atkinson individually.

Q. Was the Detroit Dry Dock Company a party to that suit?

A. I think so.

Q. Don't you remember?

A. The Detroit Dry Dock Company, the Detroit River Ferry Co., and Frederick Schulenburg were the three defendants, I believe.

Q. What, in the garnishment suit?

A. I think so.

Q. And this $3,000 was paid while that suit was on trial?

A. While the trial was going on; yes, sir. It was paid after the suit was discontinued.

Q. What was that suit about?

A. It was a garnishment suit to recover from the dry dock company moneys supposed to be held by them belonging to Schulenburg.

Q. Belonging to Schulenburg or Mrs. Horn?

A. To Schulenburg.

Q. What was the principal suit upon which the garnishment was based?

A. Growing out of the drowning of those children.

Q. Against whom?

A. Against the ferry-boat Garland.

Q. Was it not against Mrs. Horn.

A. And Mrs. Horn as owner.

Q. Is not this the was it was: That judgment had been entered against Mrs. Horn for the sum of $15,000 and Schulenburg and the

dry dock Co. and the ferry company were sued in garnishment in that case?

A. I think that is it.

73 Q. The dry dock company and Schulenburg were garnishee defendants, were they not?

A. I think so.

Q. And Col. Atkinson in that case represented the judgment creditor Cuddy, didn't he?

A. I suppose so.

Q. He was engaged as one of the counsel and tried that case before a jury, did he not?

A. He did, I believe.

Q. Mrs. Horn was not a party to that suit except as principal defendant, was she? A judgment had been entered against her and they were trying to collect it out of Schulenburg and the dry dock company. Was that the was of it?

A. That is the was of it, I think.

Q. And this judgment against Mrs. Horn was based upon her ownership of the steamer Garland that was claimed to be the offending vessel in the matter of the action?

A. That is it.

Q. This litigation that has been introduced in evidence here had been pending some years, has it not?

A. As much as four or five years.

Q. When was the accident?

A. Either in 1880 or—in 1880, I think.

Q. Who owned the steamer Garland at that time?

A. Mrs. Horn.

Q. Did it stand in her name?

A. I think so.

Q. And the steamer was sold by some proceedings in the Canadian courts?

A. Yes, sir.

Q. And bid in by whom?

A. By the Detroit Dry Dock Company.

74 Q. Was the Detroit Dry Dock Company a corporation in existence at that time?

A. It was.

Q. Had been for some years before?

A. Had been for some years before.

Q. How much did they pay for her?

A. Something more than $17,000.

Q. How much did they bid her off for in the sale in the maritime court?

A. The maritime court purchase was something over $17,000.

Q. Was that based on a judgment rendered against her in Canada?

A. There were no judgments that I know of.

Q. She was sold pending the suits over there?

A. Yes, sir.

Q. How was it; was she put up at auction?

A. She was put up at auction; yes, sir.

Q. How were the bids made? For a free title or subject to incumbrances?

A. For such a title as the court could give.

Q. Were there any mortgages on her at that time?

A. We had a mortgage on her at that time, yes.

Q. How much was it?

A. $12,500.

Q. That is, the dry dock company had a mortgage on her for $12,500?

A. Yes, sir.

Q. Did any one else have a mortgage?

A. No, sir.

Q. You say you paid $17,000 for her; did that include this $12,500 mortgage?

A. It had nothing to do with the mortgage. We paid $17,000 into the court in Canada.

75 Q. That was subject to the mortgage. What I want to get at is what the vessel cost you.

A. That would make $17,000; $12,500 and interest,

Q. Is that so, that you paid $17,000 for her subject to the mortgage?

A. Yes, sir.

Q. Is that the way of it?

A. That is the way of it.

Q. Who did you pay the $17,000 to?

A. To the marshal in Canada.

Q. Did you receive any of it back?

A. No, sir.

Q. Did you have any of those claim- over there of the dry dock company?

A. No, sir.

Q. Did you know anything about the claims?

A. I did.

Q. What were they for?

A. Various things in the nature of outfit. I don't remember just now what they were.

Q. Things bought in the construction of the boat?

A. I think it was things bought to fit her out.

Q. Who built the boat?

A. The Detroit Dry Dock Company.

Q. What was the contract price for building her?

Mr. WISNER: What is the object of this testimony? It has nothing to do with the matters set up here.

Mr. BAKER: Yes; it has.

Mr. WISNER: I object to the cross-examination as entirely immaterial.

Question read.

A. I think it was 23 or 24 thousand dollars; something like that.

Q. Did that include the furnishing of her and fitting her out entirely?

A. No, sir.

Q. That was for building what part of her?

76 A. The hull, machinery, and painting

Q. When was she built?

A. She came out, I think, in 1880.

Q. Did you build her for Mrs. Horn?

A. We built her for Mrs. Horn. I think the contract was made with her.

Q. You say that you bought this vessel at this sale and you paid $17,000. Who was the check drawn to or did you pay the money?

A. I am not certain now. I think it was a check payable to either the clerk of the court or somebody in Canada connected with the court.

Q. Did the dry dock company get possession of her at that time?

A. They did.

Q. Commenced to operate her, I suppose, and run her from that time?

A. Yes, sir.

Q. Did you have any contract with Mrs. Horn in regard to her purchase?

A. No, sir.

Q. Any agreement or understanding of any kind?

A. None whatever.

Q. Or with any one else for her?

A. Or with any one else for her.

Q. How did you come to buy her?

A. Probably thought she was worth the money we bid for her.

Q. Who was your lawyer at that time?

A. Wisner & Speed.

Q. Who was Mrs. Horn's lawyer?

A. As far as I know, they were.

Q. You know they were, don't you?

A. Well, I am not certain of it.

77 Q. Had suits been commenced—any of these suits against the Garland at that time—or threatened?

A. I don't remember.

Q. How long after the accident did you make this purchase?

A. I don't know. It must have been a couple of months, I think. I am not certain about that.

Q. The Garland had been running on the ferry line before that, had she not?

A. I think not. I think she was doing an excursion business.

Q. Did she continue the excursion business after the accident?

A. I think not.

Q. She went over on the other side and stayed, did she?

A. Before the sale?

Q. Yes.

A. Yes, sir; she was there before she was sold.

Q. Did not come into American waters at all between accident and the sale?

A. She was here after the accident.

Q. How long?
A. I don't remember.
Q. Soon afterwards she went over there and remained until after the sale, didn't she?
A. Yes, sir.
Q. Who were the stockholders of the dry dock at that time?

Mr. WISNER: I object to all this testimony as immaterial.

A. The Owen family, the Kirby family, the Campbell family, and myself.
Q. Was Mr. Schulenburg interested in that company?
A. No, sir.
Q. Who furnished the money to make this purchase?
A. The dry dock company.
78 Q. Without any assistance from anybody else? Did it take it out of its own funds?
A. Out of its own funds; yes, sir.
Q. How long did the dry dock company remain the owner of the boat?
A. I don't remember; not very long.
Q. Who did they sell her to?
A. To the Detroit River Ferry Company.
Q. What was that—a corporation?
A. A corporation.
Q. And who did she pass to then?
A. From the Detroit River Ferry Co. to the Detroit, Belle Isle & Windsor Ferry Co.
Q. Another corporation?
A. Another corporation; yes, sir.
Q. Who were the stockholders in these ferry companies?
A. The same parties—Kirby, Toms, Mr. Owen, and myself, and some one else I don't remember.
Q. That is, the stockholders of the dry dock company organized a corporation to carry on the ferry business between here and Windsor and Belle Isle?
A. Yes, sir.
Q. Did any one else become interested in that corporation?
A. No, sir.
Q. Did they subsequently?
A. No, sir.
Q. Do they still remain the stockholders?

Mr. WISNER: Let me suggest right here—you asked him in regard to these ferry companies and he has answered only as to the one. He is referring to the Detroit River Ferry Company.
WITNESS: I refer to the Detroit River Ferry Company.

Q. The Detroit River Ferry Company was composed of the same stockholders as the dry dock company?
79 A. With the addition of Mr. Toms.
Q. How long did that company continue to do business?
A. I am not certain, but not very long.

Q. Then you organized the Detroit River & Belle Isle Ferry Co.?
A. No, sir; that company was organized by Mr. Brady and us jointly. All the boats pooled.
Q. Who were the stockholders of this new company?
A. I could not tell you that.
Q. You don't know who they were at the time it was organized?
A. No, sir; there were a good many of them.
Q. Did some of the stockholders that were in the Detroit River Ferry Company become stockholders in the new company?
A. A portion of them.
Q. And there were other stockholders—Mr. Brady and others also?
A. Yes, sir.
Q. That was a consolidation of all the owners of ferry-boats here in Detroit?
A. That was a consolidation.
Q. The Detroit River Ferry Company came into it because they owned the Garland?
A. Yes, sir; they owned the Garland, the Fortune, and the Excelsior.
Q. Is that company still in existence?
A. No, sir.
Q. What has taken its place?
A. The Detroit, Belle Isle & Windsor Ferry Company.
Q. I mean that company.
A. Oh, that company is still in existence; yes.
Q. This garnishment proceeding was against Mr. Schulenburg and the Detroit, Belle Isle & Windsor Ferry Company?
A. No; the Detroit River Ferry Company.
80 Q. Did the Detroit Ferry Company become the owner in its corporate capacity of some of the stock of the Detroit, Belle Isle & Windsor Ferry Company?
A. No, sir.
Q. Did the dry dock company have any stock in it?
A. The dry dock company did have some stock; yes, sir.
Q. The dry dock company was the company that bought that boat?
A. The dry dock company was the company that bought that boat.
Q. Did it get stock for the full value of the boat?
A. It got stock for the full value of the three boats.
Q. How much?
A. It got $83,000 of stock for the three boats.
Q. How much of that was for the Garland?
A. I could not say. It was all pooled in together.
Q. You don't know how much of that was for the Garland?
A. I think $24,000 of it was for the Garland.
Q. The Garland was the most valuable boat?
A. No, sir; the least valuable.
Q. You think she was estimated at $24,000?
A. I think so.

Q. Out of the $83,000?
A. Out of the $83,000.
Q. And stock was issued to the dry dock company in its corporate capacity to the amount of $83,000?
A. The stock was issued to Mr. Toms, Mr. Owen, and myself, I think.
Q. Didn't the dry dock company get any of it?
A. As trustees for the dry dock company.
Q. They took it in their individual names as trustees for the dry dock company?
A. Yes, sir.
81 Q. The dry dock company was, then, the real owner?
A. The dry dock company was the real owner.
Q. This suit had been pending for several years when you made the settlement?
A. I think three or four; yes, sir.
Q. Who represented the dry dock company in that case?
A. Mr. Wisner and Mr. Griffin.
Q. Did Mrs. Horn have any representatives there outside of the attorney for the judgment creditor, Mr. Cuddy?
A. I don't know of any.
Q. Some other attorneys were mentioned, I think, on the other hearing. Did Mr. Alfred Russell or anybody act?
A. I don't think he participated in it.
Q. Mr. Atkinson was the active party in the prosecution of that case, was he?
A. I think so.
Q. And as far as that immediate case was concerned it was an effort on the part of Mr. Cuddy to collect this judgment of $15,000?
A. I presume that was it.
Q. Did you see Mrs. Horn and have any talk with her about this settlement?
A. I did not.
Q. You made the settlement with Col. Atkinson entirely?
A. I made it with him entirely.
Q. The talk was with him?
A. Yes, sir.
Q. All that pertained to the settlement was made with Col. Atkinson?
A. Except one remark made by John Horn, Jr., in court.
Q. What was that?
A. He came to me in the court-room, leaned over my shoulder and asked me if his mother was to be taken care of in this settlement. I told him not a dollar.
82 Q. That is what you told John Horn?
A. Yes, sir.
Q. Was Mrs. Horn in the room at the time?
A. I don't know.
Q. You made no such statement to her at any time?
A. No, sir.
Q. Who did you consult, in making this settlement, with on your side?

A. I consulted Mr. Owen, Mr. Wisner, and Mr. Griffin.

Q. Did you consult Frederick Schulenburg?

A. No, sir.

Q. Did you consult his son, Albert Schulenburg?

A. I didn't consult with him about that subject.

Q. Did you talk with him about it?

A. I did talk with him about it, at the request of Col. Atkinson.

Q. Will you give us the conversation you had with Albert Schulenburg?

A. The first talk I had with Col. Atkinson about the subject was as to whether we would pay $5,000. I produced a statement of the account, and there looked to be about $5,000 gained to the dry dock company in the whole transaction; that we were about $5,000 ahead.

Q. What became of that paper?

A. I don't know.

Question repeated.

A. I don't know what I did with it. Col. Atkinson asked me if I would be willing to pay $5,000. I said, No, it is not $5,000, because there is litigation and there are costs to be paid, and it will be whittled down to about $3,000. He asked me if I would pay that. I said, Yes, if Mr. Owen approves it; if it is a final settlement of everything. He said, Couldn't we pay it and leave
83 Schulenburg out? I says, No, it must settle every case, Schulenburg, the ferry company, the dry dock company, and all parties interested; and after a good deal of talk back and forth he requested me to see whether Schulenburg would not give Mrs. Horn *so*mething to live on—pay her $50 a month for a short time; and I went to Schulenburg at his request, went across the court-room and told him what Atkinson had said to me, and he refused point-blank to talk about it, to pay anything. I came back and told Atkinson of that, and the next day he again asked me to see whether he would not do something for her; she was poor, and it wouldn't be much of this $3,000; and I went to him again, with the same result.

Q. So you did have some conversation with Col. Atkinson about her receiving $50 a month?

A. That was the conversation, and I told him just what Schulenburg said; he would not pay a cent, he would see her starve to death first.

Q. That is what he said?

A. Yes, sir.

Q. You told Atkinson that?

A. I told Atkinson that.

Q. How many days were you in making this settlement?

A. I think it came up in the afternoon of one day and was settled in the forenoon of the next day. That is my recollection of it.

Q. Was Albert Schulenburg there both days?

A. Both days.

Q. Did he have any talk with Atkinson?
A. Not that I know of.
Q. So the talk was entirely between you and Atkinson?
A. Yes.
Q. Was Schulenburg present so he could hear the talk
84 with Atkinson?
A. He was not; he was in the court-room and may have been close by at times.
Q. But it was not carried on with him; he was not a party to it at all?
A. No; we stood around in the court-room in knots discussing the thing.
Q. Was Mrs. Horn there in the afternoon?
A. I don't remember.
Q. You could not tell whether she was or not?
A. No.
Q. You knew at the time, didn't you, that Col. Atkinson represented Cuddy?
A. I did; yes, sir.
Q. When you made this purchase who advised you as to the legality of it or as to your title when you brought the boat over in Canada?
A. Well, I don't know as we asked any advice; I don't know that we did. Mr. Toms was one of our directors at that time and he considered it was a good title.
Q. Had the dry dock company employed Mr. Wisner in any way at that time?
A. Yes.
Q. Was he the regular attorney of the dry dock company?
A. Wisner & Speed were the regular attorneys. I don't know whether he had much to do with it or not; I don't remember. The matter was largely in the hands of Mr. Toms; I didn't have much to do with it.
Q. Do these papers here show the correct date of the purchase?
A. Yes.
Q. Referring to the papers, this date, 15th September, 1880, what would you say? Was that the date the money was paid?
A. It was in September the sale took place, I know.
85 Q. Do you know whether any suits had been commenced against the Garland or Mrs. Horn on this side of the river at that time?
A. I don't remember.
Q. You do know, don't you, that Wisner & Speed at that time had been engaged by Mrs. Horn to defend the steamer and herself as far as any suits had been or might be commenced against her?
A. I think that was the case.
Q. That is the way you understood it at the time?
A. That is the way I understood it at the time, but I am not certain about it.
Q. And did Wisner & Speed remain the attorneys of the dry dock company right through all this litigation?

A. They did.

Q. Can you give us the date when they were first retained by the dry dock company—whether it was before or after the accident?

A. Oh, they had been her attorneys previous to the accident.

Q. And the relation of attorney and client, between them and the dry dock company, has continued right through to the present time, hasn't it?

A. Yes.

Q. The different suits that have been referred to here were all suits that arose out of this accident and were suits in the main that were commenced by Cuddy, as administrator, to recover of Mrs. Horn or out of the steamer, the garnishee defendants, something for the loss of the lives of the boys in question?

A. That was undoubtedly the object.

Q. You don't know of any other litigation?

A. No; I don't know of any other.

86 Q. And the interests of the dry dock company and Mrs. Horn were antagonistic to the claim of Cuddy from the beginning, were they not?

A. As to the dry dock company, after the purchase it was antagonistic.

Q. That is, the dry dock company claimed to be the purchasers?

A. They were the purchasers.

Q. That was the way you understood it, but Cuddy claimed they wer- not, didn't he?

A. I don't know.

Q. Cuddy claimed that Mrs. Horn had an interest in this boat or in the funds earned by her so as to get his judgment out of it?

A. I presume that is what he claimed.

Redirect.

Mr. WISNER:

Q. Now, I want to give you a chance to correct some of your statements, if you think you are wrong upon reflection. You stated——

Mr. BAKER: I object to the witness that he has made wrong statements. I think that is hardly fair.

Q. You stated that the Detroit Dry Dock Company and the ferry companies and Frederick Schulenburg were garnishee defendants in the superior court. Do you wish to correct that in any way?

A. The ferry company was out of existence at that time. It was a mistake of mine if I said so.

Q. Was the Detroit, Belle Isle & Windsor Co. garnishee defendant in that suit?

A. It was not.

Q. Col. Atkinson, you say, represented Cuddy in that litigation. Do you know Cowles, I. T. Cowles?

87 A. I have heard the name.

Q. Do you know in whose office he is?

A. I think now he was in Atkinson's office.

Q. And nominally represented Mrs. Horn, didn't he, in that litigation?

A. I think so.

Q. During the trial, for whom was Mrs. Horn a witness in that case?

A. For Cuddy.

Q. And when not upon the witness-stand, with whom was she in consultation during the trial?

A. With Mr. Atkinson.

Q. Sat by him, didn't she?

A. Yes, sir.

Q. You were asked if Wisner & Speed were your lawyers at the time of the sale in Canada and you said they were. Will you state what connection Wisner & Speed had with the proceedings in Canada for the dry dock Co., if any?

A. I don't know of any. They were our attorneys.

Q. What do you mean when you say they were you- attorneys?

A. Attended to any business we might have had.

Q. Did Wisner & Speed attend to any of your business in Canada at any time?

A. Not that I know of.

Q. Who were your attorneys with reference to the proceedings in Canada?

Mr. BAKER: I don't understand that you are on record in the suit in Canada at all.

A. I don't know that we had any.

Q. Were not Patterson & McHugh your attorneys over there? Did they represent the dry dock Co.?

A. They did now, come to think of it.

88 Q. Did Wisner & Speed represent the dry dock Co. in any way in regard to your Canadian matter?

A. I think not.

Q. You were asked if Wisner & Speed were the attorneys of Mrs. Horn, and you stated they were. Who employed Wisner & Speed to act for Mrs. Horn?

A. We did not.

Q. Who did, I asked you?

A. I don't know.

Q. Who paid Wisner & Speed for acting for Mrs. Horn?

A. I don't know.

Q. Didn't the dry dock company?

A. We paid the bills—I presume it was for those services—in connection with the whole litigation.

Q. Who requested you to pay Wisner & Speed as Mrs. Horn's attorneys?

A. I could not say. I presume Mr. Toms told me he had done so, because it was he that handled the matter entirely.

Q. Why, it was part of your contract with Mrs. Horn, wasn't it?

Isn't it all provided for in that contract I showed you a while ago?

A. Even in paying that bill under that contract I paid the bill at the request of some one who had something to do with it; I suppose it was Mr. Toms.

Q. You state that the Garland remained in Canada after the accident until she was sold. Do you mean to say by that that immediately after the accident she went over there and laid up and remained there until she was sold?

A. I didn't say so. I said she was here after the accident.

Q. Just state what took place. Your answer conveyed the idea to me that I suggested. I want to know what you meant by it.

A. I said she was here after the accident, and she was in Windsor when she was sold. I don't know when she went
89 over or how long she remained on that side, but I know she — taken over there and sold when she was in Canada.

Q. Do you know she ran on her regular route after the accident?

A. I don't remember.

Q. Did you hear of her being seized in Canada and of her being libelled?

A. I did.

Q. Do you know what she was doing before she was seized?

A. I don't remember.

Q. Do you know whether she was held on that seizure until the sale in Canada?

A. That is as I understand it.

Q. In the talk with Atkinson about this settlement some two days were occupied before the negotiations were completed, were they not?

A. I think so.

Q. Did I have anything to do with the talk?

A. You had more or less to do with it. I had an interview with Col. Atkinson and yourself.

Q. Do you recollect the statement that you made to me on the first day of the negotiations with reference to a proposition you had received when I came into court?

A. I remember laying the matter before you.

Q. What did you tell me?

A. That Col. Atkinson had made such a proposition, to stop the litigation on the payment of a sum of money. I don't remember whether he had then got to $3,000 or five.

Q. What was my reply to you?

A. That you would not have anything to do with the settlement.

Q. Did you report that to Col. Atkinson?

A. I did.

Q. What did you tell him?

90 A. I told him just how you felt about it.

Q. What did you tell him you would do under those circumstances?

A. I told him I would not settle unless you approved of it.

Q. Then what did Col. Atkinson do?

A. He said he would like to talk with you and we arranged for a talk.

Q. Where did you go?

A. Into the judge's room.

Q. Can you recollect what took place there?

A. Not very clearly; only you maintained the position that you did from the first, that you thought nothing but a judgment from the court would ever stop the litigation.

Q. What did I say in that regard to Col. Atkinson?

A. That you would not consent to the payment of any money, and repeated as I have done—that it must be an absolute closing up of everything.

Q. Didn't I say to Col. Atkinson that we would never get rid of these people until we got a judgment against them?

A. That was what you did say.

Q. What was his reply?

A. That he would fix it—put it in shape; that he would make a statement to the court and that you might dictate it.

Q. Q. Didn't he say, "If you will pay us that $3,000 we will settle all this litigation into such a way that it will never come to light again"?

A. Words to that effect.

Q. That took place, you say, in the judge's room?

A. Yes, sir.

Q. Who heard the conversation about taking care of Mrs. Horn that you have spoken of? You say you asked Schulenburg if he would do something for Mrs. Horn, and he said not a cent. Who heard that?

A. Mr. George Horn was present.

91 Q. Did he hear your reply to Col. Atkinson?

A. I don't think so; I am not certain about that.

Q. You went off somewhere else and told Atkinson that?

A. Yes.

Q. In that settlement that was made was anything promised on your part and on the part of Schulenburg other than the $3,000?

A. Nothing at all.

Recross.

By Mr. BAKER:

Q. Schulenburg didn't pay any of it, you say?

A. Didn't pay any of what?

Q. Of the $3,000.

A. No, sir.

Q. What interest did you have in having him included in the settlement?

A. None other than that we wanted the whole matter closed up; didn't know what might grow out of it.

Q. Had Schulenburg become a stockholder in your corporation?

A. No, sir.

Q. Is that the only explanation you have to make of your desire to include Schulenburg, that you wanted it all closed up?
A. That was the reason. I didn't know what might occur if the settlement did not include everything.
Q. You did not consult Frederick Schulenburg?
A. No, sir.
Q. But you did talk with his son?
A. I did talk with his son.

92 Re-redirect.

By Mr. WISNER:

Q. You consulted me as his attorney, didn't you?
A. Yes, sir.
Q. With reference to the settlement of his cases?
A. Yes, sir.

Re-recross.

By Mr. BAKER:

Q. He didn't pay anything at all?
A. No, sir.

Re-redirect:

Q. You paid the whole $3,000 in one check?
A. Yes, sir.
Q. Schulenburg's share of that $3,000 was arranged with you afterwards, was it not?
A. Yes, sir.

HENRY C. WISNER, a witness produced on behalf of defendant-, being first duly sworn, testified as follows:

I desire to state that the stipulations referred to in the various cases in the plea were duly filed and the orders discontinuing the cases and satisfying the judgments and decrees referred to were also entered; that I went to Washington with a stipulation for the dismissal of the case pending in the Supreme Court of the United States; that I presented the stipulation to the Supreme Court
93 in session and obtain*ing* an order dismissing that suit in accordance with that stipulation.

Cross-examination.

By Mr. BAKER:

Q. What was that suit in Washington?
A. It was an appeal from the decree of the circuit court here in the Garland case.
Q. It was a suit where Cuddy was trying to pursue the Garland?
A. Yes, sir; where he was pursuing the Garland.
Q. Schulenburg was not a party to it in any way?
A. Oh, yes; he was.
Q. How?

A. He was responsible for any decree that might be rendered against the boat.

Q. He was on the bond?

A. He was not on the bond, but he was on a contract with the bondsmen to pay any decree which should be rendered against the boat.

Q. What contract?

A. This contract has been put in evidence.

Q. That was his only connection with it; he secured the bondsmen by his contract?

A. He secured the bondsmen by his contract and he was responsible for any decree that might be rendered against the boat.

Q. Had he given any bond to take her out of the custody of the marshal?

A. She was not in the custody of the marshal. As soon as she was seized by the marshal her owner bonded her, and that bond took the place of the boat, before Mr. Schulenburg became interested in any way. When he bought from Horn, according to
94 that contract he assumed Mrs. Horn's obligation to pay any decree rendered against the boat.

Q. Then he stood in the same relation to that case as Mrs. Horn did?

A. Precisely; he stood in the same relation that she formerly did.

Defendant- rests.

November 14th, 1887, the parties appeared by Mr. F. A. Baker on behalf of the plaintiff and Mr. H. C. Wisner on behalf of the defendant-, and the following proceedings were had.

It is hereby stipulated and agreed between the counsel for the respective parties to the above-entitled cause that the testimony of John Atkinson and Sarah Horn taken in the superior court on a motion to set aside the discontinuance of the cause in the chancery suit of Sarah Horn against these same defendant- may be used on the trial and argument of this cause as the testimony of the complainant, and the complainant will furnish copies thereof to be annexed to the report of the examiner.

The hearing was then adjourned.

95 The Superior Court of Detroit. In Chancery.

SARAH HORN, Complainant,
vs.
THE DETROIT DRY DOCK CO. *et al.*, Defendants.

THURSDAY, *December* 23, 1886.

JOHN ATKINSON, sworn on behalf of the complainant.

Examined by Mr. BAKER:

Q. You were the attorney and solicitor for Mrs. Sarah Horn in some litigation that was pending in this court some time since?

A. Yes, sir.

Q. Do you remember the chancery case in which Mrs. Horn was complainant and Frederick Schulenburg and others were defendants?

A. I do.

Q. Will you state what occurred when an alleged settlement was made of that and other suits, just what was done and what was the bargain and the talk between yourself and the opposite party or parties in regard to the settlement and terms of it? The particular question to which I desire to call your attention is whether there was anything to the settlement other than that expressed on the face of the papers. Just give us the facts as they occurred at the time.

A. The case of Cuddy against the dry dock company, as garnishee defendants, was being tried and the testimony de-
96 veloped the fact that a certain amount of money remained in the hands of the dry dock company which actually belonged to Mrs. Horn.

Q. About how much as it appeared from the testimony?

A. I think on the face of it it was about $5,000, but Mr. McVittie explained that some expenditures had reduced that to about $3,000. Mr. McVittie expressed a willingness to pay that amount.

Q. To whom did he express that?

A. He expressed it to me.

Q. What talk did you have with him in regard to it?

A. On his stating or expressing a disposition to pay what was actually in their hands I advised Mrs. Horn to accept that amount. The case was finally settled, practically, on that basis, and at the same time Mr. McVittie desired that the cases against the Schulenburgs should be arranged.

Q. Let me understand you. Was this incidental to the settlement of this case or was it the main thing to be accomplished?

A. The Schulenburg cases?

Q. Yes.

A. No; this case stood by itself practically, but they desired also to settle the Schulenburg cases.

Q. What was done in regard to that? What took place between you and the opposite parties in regard to it?

A. In relation to these cases my memory is that I stated to McVittie that something should be done toward carrying out the original agreement between Mrs. Horn and the Schulenburgs in case that case was settled, and Mr. McVittie gave me his assurance that Albert Schulenburg, the young man, would do certain things provided for in that agreement of Mrs. Horn's.

97 Q. What things was he to do?

A. He was for the present, as I understood it, to pay her, I think, $50 a month, and eventually he was to see that she was paid for the property that had been placed in their hands, practically.

Q. Was any time fixed or anything said about anything happening or when he should do it?

A. Yes, sir. Albert Schulenburg expected eventually to be in a position to carry it out by receiving property from his father, but at present he would be able to carry out the monthly payments, and that he was to do.

Q. What was said about the time when he expected to receive anything from his father—when his father died or before?

A. I understood it to be when his father died or in case he should surrender the property into his hands before that time.

Q. That is, whenever he was in a position so he could do it?

A. So that he could do it.

Q. What was the talk as to the amount she was to receive, or what was she to receive?

A. I don't think at that time Mr. McVittie and I talked of the exact amount that she should receive. We had had a great many conversations about it and both understood the amount.

Q. Was it agreed upon at any time?

A. The amount that she should pay was never itself specified. The amount that had gone into the hands of the Schulenburgs from Mrs. Horn had frequently been spoken of.

Q. As how much?

A. It was $25,000 after paying the liabilities against the property turned over to Schulenburg.

Q. But the words "$25,000" were not used in this settlement?

98 A. I don't think they were used in the settlement at all. I don't remember that they were.

Q. But the $50 a month was agreed to?

Q. Had she been in receipt of any monthly payments before this?

A. The $50 a month was spoken of; yes, sir.

A. She had some years ago been receiving it.

Q. But she was not receiving anything at this time?

A. No, sir; she had not been receiving anything, as I understood it, from the time the litigation commenced.

Q. Did this litigation develop the fact that the property that Mrs. Horn claimed was in Frederick Schulenburg's hands?

A. Yes, sir; she had transferred it to Frederick Schulenburg herself.

Q. In the payment of the $3,000 were the Cuddy suits settled in any way?

A. The Cuddy suits were settled in the payment of the $3,000.

Q. And how much was paid to Cuddy in settlement of those suits?

A. I think it was just $3,000. I would not want to be positive about the amount, but that is my recollection of it.

Q. In the settlement did you receive anything additional to that for your services?

A. No, sir.

Q. Were you paid out of the $3,000?

A. I was paid by Mr. Cuddy out of the amount received by him.

Q. Out of the three thousand?

A. Yes, sir.

Q. Did Mrs. Horn receive any of the $3,000?

A. Yes, sir; Mrs. Horn received a portion of it.

Q. About $700?

A. I think so. I could tell the exact figures if I had known what you wanted.

99 Q. Do I understand you that that is all that the dry dock company or Mr. Schulenburg or anybody upon that side paid, this one payment of $3,000?

A. Yes, sir; all I have ever known of their paying.

Q. And that settled the Cuddy suits?

A. Yes, sir; simply paid over the amount developed as in the hands of the dry dock company belonging to Mrs. Horn outside of anything she had put into Mr. Schulenburg's hands.

Q. So that the Cuddy suits were settled, and at the same time the chancery suit and the other litigation between Mrs. Horn and Mr. Schulenburg was included in the settlement upon this assurance of Mr. McVittie?

A. Yes, sir.

Q. Did you have any talk with Albert Schulenburg about it?

A. I don't think I did have any talk with Albert at all.

Q. It was all with Mr. McVittie?

A. It was all with McVittie.

Q. Did he represent the dry dock company or Mr. Schulenburg in any way?

A. He represented the dry dock company.

Q. What did he have to do with Mr. Schulenburg? Is Mr. Schulenburg a large stockholder in the dry dock co.?

A. I don't know. Mr. McVittie simply professed to have an influence over Albert that would secure the carrying out of this understanding.

Q. You say that he assured you that Albert Schulenburg was to pay $50 a month, and when he came into possession of his inheritance or had control of it he was to account to Mrs. Horn or do what was right in regard to the property that was in his father's hands?

A. Yes, sir

100 Q. Now, what, if anything, did he say about his having power to represent Albert Schulenburg?

A. I don't remember that he said anything. Mr. McVittie would talk with me awhile and then go and talk with Albert.

Q. Was Albert present?

A. Albert was sitting in the room during the negotiation. It was all done right here in the court-room. Albert was sitting in *out* of the chairs.

Q. So that you had no reason to doubt his authority to make this promise?

A. No, sir; I had no reason to doubt it, and did not doubt it.

Q. Although you had no talk personally with Albert Schulenburg about it?

A. No, sir; I took Mr. McVittie's assurance entirely in that matter—relied upon it.

Q. Did you report this understanding to Mrs. Horn?

A. I did. I stated just the conversation at the time just as it had occurred.

Q. Was she present in the court-room?

A. She was here during the trial. Whether she was in at that moment or not I do not know, but she was either here or very soon after.

Q. From what occurred there and from your knowledge of the transaction I will ask you whether or not that settlement would have been made if Mr. McVittie had not given this assurance and had not stated that it would be carried out.

A. My opinion is that it would not.

Q. Did Mrs. Horn have any talk with Mr. McVittie about it?

A. I don't know of any.

Q. To your knowledge, any communication that was made with Mrs. Horn in regard to it was through you?

A. So far as I know that was all.

101 Q. Was there anything in the transaction that would lead you to believe that Mrs. Horn did not rely upon this promise of Mr. McVittie's?

A. No; on the contrary, I think she relied on it.

Q. And expected that it would be carried out?

A. Yes, sir.

Q. In order to be sure that we have it right I will ask you again whether Schulenburg or the dry dock company paid any more than the $3,000? Were there any costs or any moneys in their hands or anything else—that is, I do not mean exactly $3,000, but about the $3,000 that you spoke of?

A. I don't remember their paying anything but the one sum.

Q. They had nothing to do with dividing this money with the Cuddys?

A. No.

Q. Only they understood, of course, that would discontinue the Cuddy suits?

A. Yes, sir; the stipulations were made for discontinuance.

Q. There would be no more attempt on the part of Mr. Cuddy, as administrator, to enforce the judgment that he had obtained against Mrs. Horn—that is, as far as any proceeding against the dry dock company or Mr. Schulenburg was concerned.

A. No; Mr. Cuddy released his claim—released the judgment against Mrs. Horn—so that he could no longer have any claim against the garnishees.

Q. That Mrs. Horn had this bill in court in which she claimed that Frederick Schulenburg and the two corporations should account for this property, and, in addition to that, Cuddy, as administrator, held a judgment against Mrs. Horn and he attacked the property in their hands?

A. Yes, sir; as garnishee defendants.

Q. That is, he garnisheed Mr. Schulenburg and the companies?

102 A. Garnisheed the dry dock company and Mr. Schulen-

burg, as I remember it. We were trying the issue as to the dry dock company.

Q. Mr. Cuddy was in the position of a creditor?

A. A judgment creditor.

Cross-examination.

By Mr. WISNER:

Q. At the time the settlement was made there were pending a number of suits in the United States court involving the subject-matter that we have had over here?

A. Yes, sir.

Q. And you know of judgments on the record of the United States court in the case of Horn *vs.* Schulenburg, involving the same subject-matter we have had over here, and that in the case that we tried down there a verdict was rendered for the defendant by direction of the court?

A. Yes, sir; I know that.

Q. And you know also that one of the cases of Cuddy against the steamer Garland had been decided in the district and circuit court and had been taken to the supreme court?

A. I understood that.

Q. You know generally that the litigation was pending?

A. I know generally that there was a large number of suits there in various forms.

Q. While we were trying the case in this court, and after having been trying it for three or four days, this question of settlement came up between yourself and Mr. McVittie originally?

A. Yes, sir.

Q. Do you recollect, when I came into court one morning to *to* go on with the trial, that right here at the end of the
103 table Mr. McVittie suggested to me that they thought they would settle it?

A. I don't remember that; it might have occurred.

Q. Do you remember that I opposed the settlement?

A. Yes, sir; I think you were an obstruction in the way for a time.

Q. You recollect that my opposition to the settlement was quite forcible, too, do you not?

A. It was quite pronounced.

Q. Pronounced with the usual amount of force to show that I meant what I said?

A. Yes, sir; with a very great degree of emphasis.

Q. And at your request or suggestion, or McVittie's, yourself, Mr. McVittie, and myself went into the judge's office to talk the matter over. Do you recollect that?

A. I think I do; I recollect being somewhere with you; I think it was in the judge's office.

Q. And I repeated my opposition in there. Do you recollect my saying to you and to Mr. McVittie that it was foolish to settle with Mrs. Horn or with any of the Horns, because none of the parties

would ever have peace until there was a judgment rendered settling the matter, and that was the reason of my opposition to any settlement?

A. I don't remember that language, nor that in substance.

Q. Do you recollect saying to me, for the purpose of overcoming my opposition, "If you will pay this $3,000 we will settle all this matter so that it never can come up again"?

A. I don't recollect any such statement.

Q. Do you recollect at any time, in my presence or to me, saying anything about any consideration for the settlement other than $3,000?

A. No; I don't recollect saying anything to you in regard
104 to anything, except the payment of the amount due from the dry dock company.

Q. We agreed upon that as $3,000?

A. That was agreed upon; yes, sir.

Q. And we finally did settle, and the $3,000 was paid, was it not?

A. It was; yes, sir. That was the amount agreed upon.

Q. And receipts were given?

A. Receipts were given.

Q. And stipulations were signed for the discontinuance of all pending litigation without costs?

A. Yes, sir.

Q. And for the satisfaction of all judgments? Is not that so?

A. Yes, sir. Papers expressing complete settlement, as I remember it, were signed.

Q. Of all the litigation?

A. Of all the litigation, of every name and nature.

Q. The two papers I show you are in your handwriting, are they not?

A. They are.

Q. And the consideration spoken of, "for a valuable consideration to me in hand paid by Sarah Horn"—that is the Cuddy receipt—and the other one, "for a valuable consideration to us in hand paid"—that is the Horn receipt—when you drew these receipts you referred to the consideration that Mr. McVittie had agreed to pay for the settlement of all litigation, did you not?

A. No; I did not in the receipt from Mrs. Horn and John Horn, if you want what was in my own mind.

Q. I do not confine you to the $3,000, mind you.

A. Oh, well, if you include the other, I did.

105 Q. I include what you included.

A. Yes, sir.

Q. I ask you if you did not mean, when you wrote that receipt in this language, "for a valuable consideration to us in hand paid," the consideration that Mr. McVittie had agre-d should be paid to settle all the litigation—the $3,000 and anything else that he had agre-d to pay.

A. I certainly did; yes, sir.

Q. Then the settlement that was made and upon which that receipt was based was an entirety, was it not?

A. Do you mean the settlement with all the parties an entirety?

Q. I mean the settlement we made, which included all the litigation, was one transaction.

A. All I can say in regard to that is that it was done at the same time. The consideration paid to Mr. Cuddy was one thing, the as-urance from Mr. McVittie as to what Albert Schulenburg would do was another thing, and they went to different parties.

Q. Those were different things in your mind as to what should be done with them, but, so far as the payment by Mr. McVittie was concerned, they constituted together the consideration for the whole settlement, did they not?

A. I don't know what meaning you attach to the word "together."

Q. Did you have more than one settlement with Mr. McVittie?

A. No, but I settled different interests and different rights at the same time.

Q. At that settlement Mr. McVittie agreed to pay $3,000 and gave his assurance that Mr. Schulenburg should pay something. That was what he promised, was it not?

A. That was what he promised; yes, sir.

106 Q. On your part, representing the litigants on the other side of the controversy, it was agreed that all litigation should be dispensed with from that on?

A. Yes, sir.

Q. Mrs. Horn got a portion of this $3,000?

A. She got a portion of that from Mr. Cuddy.

Q. And that was a portion of the consideration going to her for the settlement that was made, was it not?

A. I can give you the facts in regard to that. I would not like to put a construction upon it.

Q. Give me the facts, please.

A. I had represented Mrs. Horn. My name has long been used as attorney of record by Mr. Caplis and Mr. Russell in the garnishee suits in favor of Mr. Cuddy, and Mr. Russell and Mr. Caplis were very anxious that I should co-operate with them. It was a case where it was somewhat difficult to get the testimony, and they agreed with me that a certain amount of money should be paid in case of success. They paid it; it all came into my hands, and that amount was paid, and of that I gave Mrs. Horn the amount that she got.

Q. It was a part, then, of the agreement that whatever was got out of that litigation in the case of Cuddy against the dry dock company, garnishee, Mrs. Horn should receive a portion of it in consideration of the settlement, was it not?

A. Part of what agreement?

Q. Of the arrangement between Mr. Russell, Mr. Caplis, and yourself.

A. The arrangement between Mr. Russell, Mr. Caplis, and myself

involved paying me a certain amount of money. I settled with Mrs. Horn; she was my client.

Mr. BAKER: The other side did not agree to that?

107 A. They had nothing to do with any payment to Mrs. Horn.

Mr. WISNER: What was the consideration for the payment of the $700 to Mrs. Horn?

A. The money came into my hands. I had been her attorney. I charged her what I thought was reasonable, and I gave Mrs. Horn all the rest that I got.

Q. Then the money you gave her was a part of the settlement money? You did not pay it out of your own pocket—what you gave her?

A. No; I say I gave her all that I got, except what I considered a reasonable charge. I made that as low as I could on account of her misfortune.

Q. You gave it to her because you considered it belonged to her, did you not?

A. Yes, sir; I thought in justice she ought to have it.

Q. You know that all the litigation was settled by stipulation and by orders entered?

A. I understood it to be all settled and disposed of; that we had restored good feelings between Mr. Schulenburg and Mrs. Horn, and that he was to carry out the assurance given by Mr. McVittie; and now that the matter is spoken of there was an assurance that he would go still further before getting his property, and in case Mrs. Horn was in need would take care of her, in addition to this $50 a month.

Q. He has always done that, I believe.

A. I have heard you say so a good many times, but——

Redirect:

Q. Mr. Wisner speaks of a suit in Washington and a suit in the United States court here. In the case in the United States court there is simply a judgment against Mrs. Horn for costs, is there not?

108 A. There was a judgment rendered, by direction of the court, against Mrs. Horn for costs. The bill of exceptions was being settled in that case to be removed to the Supreme Court.

Q. That was the case brought by her against Frederick Schulenburg?

A. That was an action at law——

Q. Tried by Justice Matthews?

A. Yes, sir; the case was tried before Judge Brown; held under advisement, and Judge Matthews participated.

Q. What did the decision go off on?

A. The decision went off on the ground that a bill in equity instead of a suit at law was the proper remedy.

Q. Went off simply upon the kind of remedy?

A. Yes, sir.

Q. And after that you filed the bill in this cause in this court?

A. No; my recollection is a bill was filed before in this court and was pending.

Q. But it covered the same transaction?

A. Yes, sir.

Q. And a judgment had been rendered against Mrs. Horn for costs, and you had got time to settle a bill of exceptions?

A. Yes, sir; that is my recollection of it. I am not sure but the bill of exceptions had been settled. I think it was pending.

Q. As far as the litigation that was pending in the Supreme Court of the United States was concerned it was simply a litigation between Mr. Cuddy, as administrator of the deceased boys, and the steamer Garland to establish a claim against Mrs. Horn or the steamer for the accident, I suppose?

109 A. Yes, sir; that was the object of it.

Q. What I am getting at is this: Whether or not when Mr. Cuddy was paid it did not wipe out all the creditors that had any right to pursue Mr. Schulenburg or the dry dock company or any one in regard to this property?

A. I understood it so; yes, sir.

Q. And this settlement satisfied the claims of Mr. Cuddy?

A. It satisfied all claims on behalf of Mr. Cuddy; yes, sir. It was a complete settlement with him.

Q. So that it settled everything that was involved between Mr. Cuddy on one hand and the defendants and Mrs. Horn upon the other?

A. Yes, sir.

Q. And as far as Mr. Cuddy was concerned it did not involve the relation between Mrs. Horn and the Schulenburgs or the dry dock company at all?

A. No, sir; Mr. Cuddy had no interest in those.

Q. So that in reality, in addition to this $700, the only consideration to Mrs. Horn was this assurance that Mr. McVittie gave?

A. That was all that Mrs. Horn got.

Q. And Mrs. Horn claimed, did she not, and the litigation indicated in a general way that if she could succeed in her claim against Mr. Schulenburg she would get anywhere from $25,000 to $50,000?

A. It would be a clean $25,000 worth of stock in the ferry companies, which was variously estimated at from par up to 150, I think, and interest.

Q. Of course, according to your understanding of the facts, she was releasing her right to litigate that matter with the Schulenburgs for this assurance?

A. Yes, sir.

110 Q. And what she got out of the $3,000, that was in settlement of the Cuddy litigation and simply arose from her relations with you?

A. That was my understanding of it.

Cross-examination:

Q. You don't mean to be understood that Mrs. Horn was respondent in the case in the United States court, in admiralty?

A. I do not profess to be able to state from memory the names of the parties there, but I do state the subject of the litigation. There were some 50 suits, I think.

Q. The cases against the Garland in the United States court had been changed to that extent that they had become cases against those who bonded the Garland, had they not?

A. Those were cases I personally never had anything to do with.

Q. You had heard of them?

A. I don't know whether I had. I had a general knowledge of the litigation.

Q. The settlement wiped out those cases. There was one case brought in the district court and there had been a decision against Mr. Cuddy, and Mr. Cuddy appealed to the Supreme Court of the United States, and that was the case that was settled in the Supreme Court. You knew that, didn't you?

A. I think there was a case settled in the Supreme Court. I think it got there in the way you state.

Q. Will you tell me if the settlement wiped out that case also?

A. I understood so.

111 Q. And the decree in that case was in favor not of Mr. Cuddy but of the other side for costs of the circuit and district court-?

A. It was for costs against Mr. Cuddy.

Q Did you hear that those costs amounted to $400 or $500, and that W. B. Moran was the surety on the appeal bond? Did you hear that?

A. I think I heard of it, but I don't remember the details. I think Mr. Moran's name was mentioned in some way.

Redirect examination:

Q. That suit in the United States court was an effort to collect damages on the part of Mr. Cuddy out of the steamer Garland or the men who had bonded her?

A. Yes, sir.

Q. And the steamer Garland was in the possession of the Detroit & Windsor Ferry Co.—one of their boats?

A. Well, there are three companies there and I would not say which one from memory. One of the ferry companies; I would not want to give the name.

Q. But the moment the litigation was settled and this $3,000 was paid and Mr. Cuddy received his money that wiped out all the creditors, as far as you have any knowledge of them, either in the Supreme Court or anywhere else?

A. Yes, sir.

Q. And the only thing that remained that could possibly remain would be an adjustment of the matters between Frederick Schulenburg and these companies and Mrs. Horn?

A. Yes, sir.
Q. And that was adjusted by this assurance?
A. That was adjusted by the assurance.

112 Recross-examination:

Q. I get from your statement that you mean to be understood that the $3,000 was the consideration for the settlement so far as the dry dock company was concerned, and that the promise of Mr. McVittie as to *what* Schulenburg would do was the consideration for the settlement of all the other litigation. Do you wish to be so understood?
A. The settlement with Mr. Schulenburg; yes, sir.
Q. You did not have any negotiation with Mr. Schulenburg?
A. No, sir.
Q. You did it all with McVittie?
A. I did it all with McVittie.
Q. And the $3,000 and the promise as to what Schulenburg would do came together to you, did they not?
A. They came the same day before we agreed on the settlement. As I understood it, as it was in my own mind, the way of it was this: The dry dock company paid this $3,000 as the balance of money belonging to Mrs. Horn in their hands; that settled that matter. Then they wanted the Schulenburg cases discontinued, and on this assurance from Mr. McVittie Mrs. Horn consented to their discontinuance.
Q. The promise by Mr. McVittie and the $3,000 which came to you were agreed upon before the negotiations were consummated?
A. Yes, sir.
Q. And when the settl-ment was made and you came to distribute the consideration received by you for the settlement you used the $3,000 in payment of Mr. Cuddy yourself and a portion to Mrs. Horn, and you turned over to Mrs. Horn Mr. McVittie's promise that Mr. Schulenburg would do something in the future?
A. I conveyed to Mrs. Horn exactly what Mr. McVittie told me.
113 Q. In that way you distributed the consideration that you received?
A. That may be called a distribution.
Q. There was a case pending also against Mr. Schulenburg as garnishee?
A. Yes, sir.
Q. That was settled by payment of the $3,000?
A. Of course by releasing the judgment against Mrs. Horn there was no longer any standing against the garnishee defendant.

SARAH HORN sworn on her own behalf.

Examined by Mr. BAKER:

Q. When the cases were settled that we have been talking about how much money did you receive from Col. Atkinson?

A. $700.

Q. Did you personally have any talk with Mr. Wisner or Mr. McVittie or Frederick Schulenburg or Albert Schulenburg or any of the other parties in regard to the settlement?

A. No, sir.

Q. Did you learn anything about the settlement except what was communicated to you by Col. Atkinson?

A. No, sir.

Q. What, if anything, did Col. Atkinson tell you that you would receive in addition to the $700?

A. He said I was to have $50 a month as long as old Mr. Shulenburg lived, and at his death I was to have $25,000, and that is what I settled on.

A. $25,000 in money or stock?

Q. In stock.

114 Q. Stock in what?

A. In the ferry company.

Q. That is, when old Mr. Schulenburg should die?

A. Yes, sir.

Q. Did you rely upon that when you settled?

A. I did.

Q. Your understanding was that you were to have that when Albert should come in possession of the property?

A. Yes, sir; I did.

Q. You expected to have $50 a month?

A. I did.

Q. Did you receive it?

A. No, sir.

Q. You were told you would receive it?

A. Yes, sir.

Q. Would you have made the settlement if you had not been told that you would receive $50 a month?

A. No, sir.

Q. And that when the time came you would receive some stock?

A. I could not have made the settlement without that.

Cross-examination.

By Mr. WISNER:

Q. When Col. Atkinson told you that Albert would give you $25,000 worth of stock when the old gentleman died, did you say anything to Col. Atkinson about the possibility of the old gentleman not leaving Albert any of the stock?

A. No, sir; not that I remember of.

Q. That did not occur to you?

A. No, sir; there are other witnesses, of course, can prove what Mr. Schulenburg said.

Redirect examination:

Q. You supposed that arrangement would be carried out?

A. That is the only thing I settled on.

Q. You did not know what the law was in regard to such promises?

A. No, sir.

115 DETROIT, *Nov.* 21*st*, 1887.

At ten o'clock a. m. the parties met together, Mr. F. A. Baker appearing on behalf of the complainant, H. C. Wisner on behalf of the defendants.

ALEXANDER MCVITTIE recalled.

MR. WISNER:

Q. You recollect the trial that was commenced and proceeded with in March, 1886, in the superior court, in which Cuddy was p-aintiff, Sarah Horn principal defendant, and the dry dock company garnishee defendant?

A. I do.

Q. Col. Atkinson in his testimony states that by the evidence in that case it appeared that there remained certain moneys in the hands of the dry dock Co. belonging to Mrs. Horn. Will you state whether that is the fact or not?

A. There was no money in the hands of the dry dock company belonging to Mrs. Horn.

Q. Did the evidence upon that trial show that there was any money in their hands belonging to Mrs. Horn?

A. Not that I remember.

Q. I think Col. Atkinson places that amount at $5,000. Will you state what was shown or what appeared from the testimony in that case regarding $5,000 in the dry dock company's hands over and above what Mrs. Horn originally owed the dry dock company?

A. I don't know now that I was examined on that point or that any witness was. I brought a statement down to the court showing that in all our details outside of Mrs. Horn in the purchase of several other boats we had cleared $5,000 in the trade at that time.

116 Q. Did it not appear, either by your statement to Col. Atkinson or in some way, on that trial that in the entire dicker the dry dock company had made, to use the expression, about $5,000?

A. Yes, sir; by that statement; but there were costs and charges.

Q. That is the $5,000 he refers to, isn't it?

A. That is the $5,000 he refers to.

Q. While the trial was proceeding you had some conversation with Col. Atkinson about the settlement of the litigation?

A. I did.

Q. Col. Atkinson states that you expressed a disposition to pay what was actually in the dry dock Co.'s hands in settlement. How did you express your disposition?

A. He expressed a disposition to settle——

Q. Just go on and state what the conversation was. Who spoke first?

A. He spoke first. He saw that statement, and he said, "Would you be willing to pay that over to Mrs. Horn in full settlement of all this litigation?" I said to him, "So far as I am personally concerned I would be quite willing to pay this amount to stop all this business finally;" but I said I should be obliged to talk with Mr. Owen first before I consented to it.

Q. What did he say then?

A. The matter was dropped until the afternoon. I was to see Mr. Owen that day. I think we did not go on with the case; waited until afternoon, and I saw Mr. Owen was quite willing to pay any balance of profit there might be in the transaction, and that we fixed upon as being about $3,000. There were bills that had not come in that we had not paid.

Q. How did the dry dock company make a profit of $5,000? State briefly. I don't want you to go into detail over the
117 whole five years' business transaction, but state briefly how you reached that $5,000.

A. Well, I can't do it very well to get that—the—we bought——

Q. (Interrupting.) Start here: In the first place, Mrs. Horn was indebted to the dry dock company?

A. Yes, sir.

Mr. BAKER: About how much?

Mr. WISNER: For the two boats, the Excelsior and Garland?

WITNESS: $30,000, I guess.

Q. How much had she paid on the boats? In the first place, did she ever pay anything on the boats?

A. She never paid anything.

Q. Did anybody ever pay anything for her?

A. Money was paid to us by Lew. Horn.

Q. Where did it come from?

A. From Mr. Schulenburg; at least, John Horn told me so.

Q. You received something from the earnings of the boat?

A. Something from the earnings of the boat.

Q. And that reduced her indebtedness to a certain amount?

A. Yes, sir.

Q. How much?

A. On the Garland, $13,000, and there was a mortgage on the other boat amounting to $16,000. I am not sure as to the figures, but enough to make about $30,000.

Q. Now, that is the indebtedness of Mrs. Horn?

A. Yes, sir.

Q. I want to know how you made a profit out of that indebtedness of $5,000.

A. In purchasing the Garland at the sale. We operated her on the river here and earned some $10,000 that fall; I am not certain of the amount.

Q. Well, go on.

118 A. In putting them into the association down here we made some money out of that transaction—that is, the stock was at a premium, and the whole thing when footed up showed we were the gainers about $5,000 on the money we had put in.

Q. After you had got the boats in your possession you put them into a ferry company and took stock?

A. Yes.

Q. And that ferry company purchased another boat?

A. Purchased the Fortune.

Q. Then you organized a new ferry company with parties owning other boats, and the stock in the new ferry company came to the dry dock company at its value then, amounting, as I understand you, to about $5,000 more than the dry dock company had invested in it?

A. I think that was it.

Q. You fixed upon $3,000 for this settlement. I want you to go on and give the conversation between you and John Atkinson about the settlement.

A. I cannot give you the conversation exactly. He was extremely anxious that this matter should be settled, and that this money should be paid over, and you were just as much opposed to any settlement, because you did not believe it would be final. He repeatedly said it would be final without any question, and it was only accepted on that ground. I would never have thought of it and Mr. Owen would never——

Q. Hold on. I am rebutting his testimony and I want to keep somewhere in the same channel he is in. Can't you put your mind on that? Whn you negotiated this settlement state what was paid.

Mr. BAKER: Can't you state just what words passed?

119 A. I tell you I can't. This thing has been dragging along for five or six years.

A. No, no. I am speaking of the settlement. Can't you recollect what took place?

A. I can't recall the words. I recollect John Atkinson——

Q. (interrupting.) Wait a moment. You can't make me believe you can't remember what took place there. In the first place we were trying a case over there?

A. Yes, sir.

Q. The dry dock company were trying that case?

A. Yes, sir.

Q. Mr. Griffin and myself were the attorneys?

A. Yes, sir.

Q. You represented the dry dock company. You remember those facts?

A. Yes, sir.

Q. Col. Atkinson suggested a settlement to you?

A. Yes, sir.

Q. And asked you if you would be willing to pay this $5,000 in settlement. Is that so?

A. Yes.

Q. And you told him that with the expenses out it would be over $3,000?

A. Yes; that is what I told him.

Q. And as far as you were personally concerned you would be willing to pay that, but you would have to see Mr. Owen first?

A. Yes, sir.

Q. Go on and state what took place.

A. I walked, as I remember, from the court-room with Col. Atkinson down-town to the corner of Congress St., and I had that talk with him—that he wanted this money—and he said it would
120 be a full settlement, and he wanted to get it off his hands; and I told him then, as I said in court, that I would see Mr. Owen and let him know in the afternoon—I think it was in the afternoon we were to meet again—and I told him then Mr. Owen was willing to pay if it was a final settlement; was willing to do anything that I might recommend should be done.

Q. When we went into court in the afternoon do you recollect that I was late; that court had been called to order before I got in there?

A. I don't.

Q. Do you recollect when I came in court you came to me, saying that you proposed to settle this matter? Can't you carry your mind back there?

A. I cannot recollect the time. I think I told you at the time it was first suggested.

Q. Have it so then; only I want you to state.

A. I think so; only I cannot be positive. We had a strike on our hands at that time, and I was as full of business as any man in Michigan, and it makes it impossible for me to remember everything in detail.

Q. The strike hadn't anything to do with the talk in the court-room?

A. It has a good deal to do with putting me in condition not to remember very distinctly all the details concerning this case.

Q. What did you say to me about the settlement when I came in?

A. I told you what Atkinson had offered. He wanted to settle and get rid of the case, and that he would make any statement you *you* might dictate to the court that would be satisfactory if you would consent to a settlement.

Q. What did I say?

A. You said no, you would not. You went into the judge's room and discussed it together.

121 Q. Who did?

A. You and Col. Atkinson and I.

Q. What did I say?

A. You repeated what you said outside—you would be damned if you would give your consent to any such thing; nothing but a judgment of the court would stop this litigation.

Q. What did Col. Atkinson say then?

A. Declared that he would——

Q. (Interrupting). Would what?

A. That he would fix it; make any statement to the court; would draw up any paper you might dictate.

Q. Now, Mr. McVittie, when I stated in Judge Chipman's office

in your presence and Col. Atkinson's presence that I would be damned if I would consent to any settlement, because nothing but a judgment would give my client peace, do you remember what Mr. Atkinson said?

A. I don't remember what he said.

Q. Do you remember that he said, "Wisner, if you will pay us that $3,000 we will settle this business so it will never come up again"?

A. I could not give the words, but words to that effect.

Q. What were we talking about?

A. All this litigation.

Q. All of what litigation?

A. The various suits against the dry dock company, myself, Schulenburg, Mrs. Horn's suit against us, the garnishee suit, and everything we had been interested in.

Q. Col. Atkinson says that you desired also to settle Schulenburg's cases, "and in relation to those cases I stated to Mr. McVittie that something should be done towards carrying out the original agreement between Mrs. Horn and the Schulenburgs in
122 case that case was settled, and Mr. McVittie gave me the assurance that Schulenburg, the young man, would do certain things provided for in that agreement with Mrs. Horn." Now, can you recollect what took place in regard to that?

A. I recollect only the desire that Col. Atkinson had that Mr. Schulenburg might pay the old lady $50 a month.

Q. What did he say?

A. He asked me to arrange with Schulenburg to give Mrs. Horn $50 a month for a time; he didn't say for how long. He first wanted to leave out Schulenburg in the settlement. I said, There is no use talking about leaving anybody out, I won't be considered. He then said, "Will Schulenburg take care of the old lady—keep her from going to the poor-house; give her $50 a month?" I said, I don't know; I will ask him; I don't think he will, and I went over to him in the court-room, at the suggestion of Col. Atkinson, to see whether Mr. Schulenburg would do anything, and he wouldn't do anything—he declined.

Q. What did he say?

A. He said he wouldn't do anything; he would see her in the poor-house first.

Q. What did you say?

A. I came back and told Col. Atkinson what he had said. At the second interview he again requested me to see whether Mr. Schulenburg would not do something, and I went a second time to Schulenburg with a like result.

Q. Now, you are only giving conclusions "with a like result." You went to Schulenburg and said something to him and he said something in return?

A. I said to him just what I said to him in the first place; I presume I did.

Q. Repeat it, then; give your testimony properly.

123 A. There is no use asking me to give it word for word.

Q. You can give it substantially word for word.

A. I can give you the substance of it, which was that Schulenburg should give her $50 a month, and he declined both times—declined emphatically.

Q. Who was present?

A. George Horn was sitting alongside Schulenburg at the time.

Q. What did you do with the information Schulenburg gave you?

A. I brought it right back to Col. Atkinson; told him just what he said.

Q. Was that before or after the $3,000 was paid?

A. Before.

Q. Did you hear anything about Schulenburg taking care of Mrs. Horn after that?

A. Not after that.

Q. Then the settlement was made?

A. Yes, sir.

Q. The $3,000 was paid, receipts were changed, and the stipulation signed?

A. Yes, sir.

Cross-examination.

By Mr. Baker:

Q. You say that Col. Atkinson at first wanted to leave Frederick Schulenburg out of the settlement?

A. Yes, sir.

Q. Did Frederick Schulenburg have any interest in this $5,000?

A. None at all.

Q. Did he pay any part of the $3,000 that was paid?

A. None; not at all.

Q. Did he own any stock in the dry dock company?

A. Not at all.

124 Q. What interest was it, then, to you to include him in the settlement?

A. Nothing more than that we had been together in other transactions, and I did not know but what some litigation might grow out of that.

Q. This was a suit in garnishment against the dry dock Co.?

A. Against the dry dock company; yes.

Q. That was the only suit that was pending against the dry dock company, was it?

Q. There were other suits at that time, I think, pending against the dry dock company.

Q. What suits?

A. I cannot give them to you. The records show what the suits were.

Q. So that Schulenburg, without paying anything or being interested in the settlement at all, was included in the settlement upon your motion?

A. Yes, sir; he was included in that settlement.

Q. You say you refused to make any settlement unless he was included?

A. Yes, sir.

Q. Did Col. Atkinson, in the negotiation and talks had there, ask to have something done for Mrs. Horn?

A. As I just said, he asked that $50 a month should be paid to her.

Q. Who did he want to pay that?

A. Albert Schulenburg.

Q. Did he want Albert Schulenburg or you to agree to pay that?

A. Albert Schulenburg.

Q. Did he have any talk with Albert Schulenburg to your knowledge?

A. Not to my knowledge.

125 Q. The conversation was all between you and Col. Atkinson?

A. Yes, sir.

Q. What did Col. Atkinson finally say when he receded from that position?

A. I don't know that he said anything that I remember; I have no recollection of the words.

Q. Was there no further talk about it?

A. Not that I have any recollection of; no.

Q. So that Col. Atkinson started out, when he started out talking about the settlement, with the proposition that he did not want Frederick Schulenburg included in that?

A. No.

Q. And then, when you insisted on having him included, he wanted the Schulenburgs among them to do something for the old lady to keep her out of the poor-house?

A. Yes.

Q. That is the way he talked with you?

A. Yes.

Q. You went and consulted with Albert, but not in the hearing of Col. Atkinson; Col. Atkinson didn't hear you talk with Albert?

A. I don't think he heard the first conversation, but I don't know about the second conversation.

Q. You would not say that he did?

A. I would not say that he did; no, sir.

Q. So that, as I understand you, you simply reported to him that Schulenburg would not do it?

A. I reported that to him; yes.

Q. Was that all there was of it?

A. The balance was consulting with him on that basis.

Q. I know, but you went on and made some papers—concluded a settlement?

A. The papers were made.

126 Q. You concluded a settlement, but what was said by which Atkinson indicated or you arrived at a conclusion that nothing should be done for Mrs. Horn you can't say. What did Atkinson say about that?

A. I have no recollection of what he said, only he said he would draw up a paper and make a statement to the court.

Q. Didn't you have a conversation like this, while Albert would not agree to do it, and you representing that side while you said you would not agree to do any such thing you said you would do something for her?

A. I would?

Q. Yes.

A. No, sir.

Q. Or Albert?

A. No, sir; I might have said that as he was her son-in-law he might help her, but I gave him to understand that he would not do anything. He was very bitter in his opposition to her.

Q. Wasn't it about this way: That you would not agree to do anything so you would be bound by it, but that you had no doubt that he would do something for her so she would not have to go to the poor-house?

A. I might have, but he said he would not do anything in any way.

Q. You say Sarah Horn did not pay any money on these boats. Certain moneys were paid in, were there not?

A. I didn't say Mrs. Horn didn't pay it.

Q. Certain moneys were paid in for which she received credit in these companies?

A. No, sir.

Q. You don't know where it came from?

A. Only what John Horn told me, that Schulenburg furnished the money.

127 Q. This statement was made up in the basis of this contract that is annexed to the bill in this case about these six hundred shares of stock; that is the statement that you produced on that trial?

A. Yes, sir; about the amount it sold for.

Q. The indebtedness was figured up as is stated in that contract?

A. The indebtedness of Mr. Horn?

Q. Yes.

A. Yes.

Q. And Schulenburg paid the amount that was due to the company on that contract, did he not?

A. He paid us; yes.

Q. So these six hundred shares of stock were issued to him?

A. Finally issued to him, yes; when paid.

Q. Does he hold that stock yet?

A. I could not say.

Q. The bulk of it?

A. We haven't any of it.

Q. So that substantially Schulenburg took Mrs. Horn's place under the contract?

A. Substantially.

Q. Either the dry dock company in its capacity as a corpora-

tion or you as secretary had nothing to do with Schulenburg outside of these matters—this contract and the stock?

A. Well, I should judge we had. I am not certain.

Q. How?

A. If we sold him the property we would have to defend it.

Q. You had no other connection with him except under this contract in which he had taken the place of Mrs. Horn?

A. Yes, sir.

128 Q. So that in reality this settlement of the garnishee suit and the litigation as far as your company was concerned did not involve the relations between Mrs. Horn and Schulenburg? It didn't make any difference to your company or to you individually or to any one connected with your company how their matters were fixed up, did it?

A. I don't know that it did.

Q. In figuring up this $5,000 or getting at the $5,000 you certainly made up a statement of account with Mrs. Horn, or rather with Schulenburg, who had taken her place, in which you charged her with an indebtedness and gave her credit——

A. (Interrupting.) For $9,000, isn't that it? The difference between what had been paid on the contract and the face value of the stock.

Q. Calling the stock at par value?

A. Yes, sir; calling it as in the contract. We sold it at par.

Q. I don't exactly understand how you got at it.

A. We had paid $69,000 out and we had $83,000 worth of stock and Mrs. Horn had $9,000.

Q. That is, $69,000 from $83,000 left $14,000?

A. Yes, sir; and $9,000 had been credited to Mrs. Horn. That left $9,000 she had credited on the $60,000, and that left $5,000, which we had made out of it. That statement was made out, but there were costs and various charges against that $5,000 which reduced it to about $3,000.

Q. Where was Frederick Schulenburg when this settlement was made, do you know? Was he here in town?

A. I don't remember now whether he was. I think he was.

Q. You didn't consult him in regard to it?

A. I did not.

129 Q. But you did consult with his son, Albert?

A. I did.

Q. Was he acting for his father or for whom?

A. I could not say.

Q. You only consulted Albert in regard to Col. Atkinson's wishes about providing something for Mrs. Horn. You did not consult him in regard to the settlement you were making for the dry dock company?

A. I did not. I talked with him — court about what Col. Atkinson wanted.

Q. If Col. Atkinson had not wanted something for Mrs. Horn you would not have consulted Albert?

A. I think I would, yes.

Q. Why?

A. Because this whole deal we were all more or less mixed up in. I wanted the thing to be final; I wanted him to know about it.

Q. I want to know why you should intercede in behalf of Schulenburg?

A. Because I hoped Schulenburg would pay a part of the $3,000.

Q. Did you ask Albert to pay her?

A. I did.

Q. What did he say?

A. He said when he was able to pay it he would pay it.

Mr. WISNER: He has since paid it, hasn't he?

A. He has given me a note for it.

Mr. BAKER: For how much?

A. $1,500.

Q. Albert agreed to do that when you were talking about making the settlement?

A. Yes, sir.

Q. That is all that he could say, that he would pay it when he could?

130 A. Yes, sir.

Q. What was the object of that?

A. To save us from paying out $3,000. We thought we ought not to pay it all out.

Q. You think you ought to have a part of it for yourselves?

A. Yes, sir.

Q. Did Albert Schulenburg give you that note at the time?

A. Yes, sir; he did, or within a few days of it. I don't remember now.

Q. Did Albert say he would not agree to do anything for the old lady, but of course he might?

A. He didn't say that he might at all. He was opposed to doing anything.

Q. Or agreeing to anything?

A. Or agreeing to anything.

Q. But you told Atkinson you thought he would?

A. I thought he would have to, and I thought he would take care of the old lady in the way of keeping her from starving.

Q. Then, as I understand you, you received $83,000 in stock?

A. For the three boats.

Q. In the Detroit, Belle Isle & Windsor Ferry Company?

A. That is it, sir.

Q. About how much did you receive from Schulenburg on that contract?

A. About $51,000 and interest.

Q. Did you receive the expenses that that contract refers to that were paid to Wisner & Speed? Did he comply with that contract?

A. He complied with that contract. He took the place of Mrs. Horn in that contract.

Q. So that contract, as far as the dry dock company are concerned, was performed?

A. Yes, sir.

131 *A. Yes, sir.*

Q. And Schulenburg got the stock?

A. He got the stock and we got the money.

Q. That is, he got the six hundred shares?

A. He got the six hundred shares.

Q. What were they worth?

A. We sold them at par.

Q. To whom?

A. To Mrs. Horn.

Q. What was their market value when Schulenburg got them?

A. I don't know; it is pretty hard to determine that.

Q. What does this $69,000 represent?

A. That is the amount of money we invested in the three boats, the total amount of money we invested in the three boats. That is just what they owed us at the time we took them into the ferry company.

Q. I know, but you got $51,000 of it from Schulenburg?

A. That is what we were to pay out. We had $83,000 represented in it.

Q. At its par value?

A. At its par value.

Q. So Mrs. Horn was entitled to $63,000 of it?

A. Yes.

Q. That left $23,000 in the dry dock company?

A. Yes.

Q. Have you that yet?

A. No, sir; it has been sold.

Q. And the $9,000—oh, that is the difference between the $51,000 and the $60,000?

A. Yes, sir.

Mr. WISNER: Simply an amount of credit?

A. Yes, sir; we credited her $9,000 on the $60,000.

132 Q. That is, that was over and above what Schulenburg owed you? He paid you $51,000 on the contract?

A. He paid what the contract provided for.

Q. The dry dock company was a corporation that built vessels, was it not?

A. Yes, sir.

Q. And had built these vessels under contracts originally with Mrs. Horn or in Mrs. Horn's name?

A. One boat in Mrs. Horn's name, I believe.

Q. You were originally connected with it simply because you built boats?

A. Yes, sir.

Redirect.

Mr. WISNER:

Q. Did you assure Col. Atkinson that Albert Schulenburg would pay Mrs. Horn $50 a month?

A. I did not.

Q. As a part of this settlement?

A. I did not.

Q. Did you assure him that when Albert came into possession of his inheritance or had control of it he would account to Mrs. Horn in regard to the property in his father's hands?

A. I did not.

Q. You stated to him just what Albert said to you, that he wouldn't do anything for her?

A. I stated that simply to him.

Q. And when Col. Atkinson asked you if Albert would not do anything for her to keep her from going to the poor-house you said that he was her son-in-law and you thought he would not let her go to the poor-house?

133 A. That is what I said.

Q. Now, this contract you have been asked about, I want to understand it clearly. There were three boats involved in this dicker?

A. Yes, sir.

Q. The Garland, the Excelsior, and the Fortune?

A. Yes, sir.

Q. And the dry dock company controlled these three boats?

A. Yes, sir.

Q. Before the contract was entered into with Mrs. Horn, and then Schulenburg afterwards assumed it?

A. Yes, sir; that is so.

Q. The dry dock company put those into the Detroit, Belle Isle & Windsor Ferry Co., and received for all of them $83,000 worth of stock?

A. Yes, sir.

Q. That $83,000 of stock cost the dry dock $69,000?

A. That is it, sir.

Q. So that, treating that stock as of its par value, you were $14,000 ahead?

A. That is it.

Q. Now, standing in that relation with these boats, you made this contract to sell Mrs. Horn $60,000 of stock for $51,000, did you not?

A. I did.

Q. And the contract, in addition to requiring Mrs. Horn to pay the $51,000 for the $60,000 of stock, required her to pay you the expenses you had paid in the litigation that arose in the collision between the Garland and Mamie; isn't that true?

A. That is what the contract provided for.

Q. She transferred her rights in that contract to Mr. Schu-

134 lenburg and he performed the contract with the dry dock company by paying to the dry dock Co. the $51,000?

—. ——.

Q. And the amounts the dry dock Co. had paid out in expenses in the litigation?

A. Yes, sir.

Q. And how much did those amount- foot up, do you recollect?

A. I don't remember.

Q. You can come within $50,000 of it. About how much?

A. Well, five or six thousand dollars.

Mr. BAKER: Can you give us the total amount of the check he gave you for it?

Mr. WISNER: I guess it was paid at different times.

Mr. BAKER: Can't you give the aggregate of the payments?

A. I think, without being certain as to the amount, that it cost him pretty near par before he got it paid up.

Q. Never mind any conclusion. I want you to tell how much Schulenburg paid you that you had paid for expenses in litigation.

A. You can't get it from me, for I don't know. If I was to guess it would be a mere guess; any man in the room could guess as near as I could. I think it was $6,000 fully, but that is a mere guess.

Q. That left Schulenburg that stock at par value with a profit of between six and nine thousand dollars, if it was $6,000 that he paid you?

A. No; it wouldn't be a profit of from six to nine thousand dollars. No; it would be a profit of $3,000.

Q. I say the difference between $6,000 and $9,000.

A. Yes, sir.

Mr. BAKER: Did he pay any interest on the $51,000?

A. Not much, because he paid it very promptly.

135 Recross.

Mr. BAKER:

Q. According to those figures you received from Schulenburg for the stock about $57,000?

A. Well, put in that we did; we only received $51,000 and whatever interest there was.

Q. And he liquidated these bills of Wisner & Speed and other expenses to the amount of about $6,000?

A. Yes, sir; that is as near as I can guess at it.

Q. What were those services for? In this litigation?

A. In this litigation.

Q. In defending the steamer Garland?

A. I presume that.

Q. And Mrs. Horn?

A. And Mrs. Horn.

Q. So, you got $51,000 from him and you got $23,000 of stock?

A. Yes, sir; made $74,000 that we realized on what cost us $69,000 at that time. I might state there, though, that the net gain of the whole thing was about $10,000, and half of that we allowed; $5,000 of that $9,000 that went to Mrs. Horn was half of the profit.

Q. Mr. Schulenburg simply paid the $51,000 and got the six hundred shares of stock?

A. Yes, sir.

Q. You were not a party to the arrangement between he and Mrs. Horn by which he advanced that money?

A. No.

Q. You didn't have anything to do with that?

A. No.

136 Redirect.

Mr. WISNER:

Q. The contract leaves the dry dock company a lien on this six hundred shares of stock for all the money it might pay out by way of expenses, and Schulenburg paid you the $51,000 and the money you paid out for expenses before he got the stock?

A. Yes, sir.

ALBERT SCHULENBURG, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Examined by Mr. WISNER:

Q. You are the son of Frederick Schulenburg?

A. Yes, sir.

Q. You were present when this litigation in the court was settled?

A. Yes, sir.

Q. Was your father there?

A. No, sir; he was in Detroit.

Q. He had been there during the trial?

A. He had been there once or twice.

Q. Did you have any conversation with John Atkinson about this settlement?

A. I did not.

Q. Did you hear any conversation between Atkinson and McVittie or between Atkinson and myself?

A. Yes. I was in the court-room amongst you when you were talking.

Q. What conversation did you hear?

A. Col. Atkinson was pleading with you——

137 Q. (Interrupting.) There is another conclusion.

A. Oh, well, the conversation was——

Q. (Interrupting.) Can't you tell what you heard?

A. I didn't hear much of that conversation. You adjourned to the judge's room; then you were over at the table in front of his desk and I was sitting on the south side of the court-room——

Q. I don't care anything about the reason why you didn't hear it. If you didn't hear it say so and we will go on with something else.

A. I heard Atkinson ask you in talking with you to agree to that arrangement and not stand in the way of a settlement.

Q. You had not conversation with Atkinson yourself?

A. No, sir; none at all.

Q. Did you have any with McVittie about the settlement?

A. Yes, sir; McVittie came over to me and said that Atkinson was proposing a settlement, and asked me what I thought of it.

Q. That was all he said to you?

A. Well, then he said to me that Atkinson in the settlement wanted me to agree to give Mrs. Horn $50 a month for a couple of years, and I told him I couldn't do that and wouldn't do it; that I had already done all I intended to do.

Q. Was there anything more?

A. Yes, sir; then there was a minute of conversation in regard to some matter and Atkinson stood alongside of McVittie and myself when McVittie spoke about it. He said, says he, "Col. Atkinson wants you to give Mrs. Horn that $50 a month; he says he don't care for you to say any definite time you will give it to her, but just give her $50 a month, you can stop any time;" and I said I wouldn't do it. Atkinson never spoke to me in regard to the matter.

138 Q. Did you hear any more about it?

A. I never heard anything until Mr. Baker——

Q. (Interrupting.) Did you hear anything more about it before the settlement was made and the $3,000 paid over?

A. No; not a word.

Q. When McVittie told you they were willing to settle the whole controversy for $3,000 he asked you to pay half of it?

A. Yes, sir; he asked me if I would not pay half.

Q. And you agreed to pay half?

A. Yes, sir; I told him that I thought if they were bound to make a settlement with them that they should not pay the whole of it.

Q. And you did pay him half of it or settle with him?

A. Yes, sir.

Q. Do you know how much your father paid on that contract by way of expenses and advances made by the dry dock Co.?

A. I don't remember. It was in various amounts; $2,500 and two or three hundred odd dollars, and one time over $5,000, and it amounted up to over $6,000.

Q. In addition to that $6,000 what did your father pay Mrs. Horn?

A. $200 a month for three years.

Q. What did that amount to?

A. Amounted to $7,200.

Q. So that your father actually paid more than the par value of that stock by $4,200?

A. Yes, sir, and since a great deal more.

139 Cross-examination.

By Mr. BAKER:

Q. You say that these expenses amounted to about $6,000?

A. Yes, sir.

Q. Was that the money paid to Wisner & Speed for legal services and disbursements in this litigation?

A. Yes, sir; a great deal of it.

Q. Well, all of it?

A. Yes, sir; the principal portion of it.

Q. But that was for their services in defending the steamer Garland and Mrs. Horn against the claim made by Cuddy?

A. Yes, sir.

Mr. WISNER: And for defending George Horn?

A. And for defending George Horn. They commenced criminal proceedings against George Horn.

Q. Against George Horn as master of the Garland at the time of the accident?

A. Yes, sir.

Q. So these expenses of about $6,000 were incurred in defending substantially the rights of Mrs Horn and the steamer Garland in connection with this accident?

A. Yes, sir.

Q. George Horn was her son and the master of the boat at the time?

A. Yes, sir.

Q. He paid $51,000 to the dry dock company under that contract?

A. Yes, sir.

Q. He paid these expenses of Wisner & Speed from time to time until they amounted to about $6,000?

A. Yes, sir.

Q. And also paid Mrs. Horn $200 a month for three years?

A. Yes, sir.

140 Q. Those were all his payments?

A. I guess so, under the contract.

Q. Does he still own the stock?

A. Yes, sir.

Q. All of it?

A. Yes, sir; and a little more.

Q. Has he bought some other stock since?

A. No, sir.

Q. The market value of the stock is somewhat more than par, isn't it?

A. I don't know that it is.

Q. You have been offered more for it?

A. We have not.

Q. Is it for sale at par?

A. I don't know whether it is or not.

Q. Your father has been in receipt of dividends on that stock right along ever since he has had it?

A. Yes, sir.

Q. Do you know what they are?

A. No; I don't know from memory what they are.

Q. The Detroit, Belle Isle & Windsor Ferry Company control all the ferry-boats on the Detroit river, except one controlled by Mr. Walker?

A. Yes, sir.

Q. They have control of all the boats that run to Belle Isle?

A. Yes, sir; they run their boats there. They don't have control of all the boats that run there.

Redirect.

Mr. WISNER:

Q. At the time your father took this contract was the stock of the ferry company worth more than its par value?

141 A. No, sir.

Q. Was it when he had acquired the ownership of it worth more than its par value—at the time he acquired it?

A. No, sir.

GEORGE HORN, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Examined by Mr. WISNER:

Q. You were present during the trial of this case in the superior court?

A. I was; yes.

Q. Did you hear McVittie ask Albert Schulenburg anything about your mother?

A. I did; yes, sir.

Q. What?

A. He came over to Albert, and I was sitting alongside of him, and he said Atkinson proposed settling the case, and he wanted to know if Albert would agree to give mother $50 a month, and he said it did not matter about what length of time it was if he would agree to give it to her. He said he would not agree to it at all; not *n*ave anything to do with it.

Cross-examination.

Mr. BAKER:

Q. Are you in the employ of Mr. Schulenburg?

A. I am in the employ of the ferry company.

Q. Of the Detroit, Belle Isle & Windsor Ferry Company?

A. Yes, sir.

142 Q. What do you do?

A. I sail the steamer Excelsior.

HENRY C. WISNER sworn on behalf of the defendant:

Q. At the time the trial in the superior court was going on of the case in which Cuddy was plaintiff and Sarah Horn the principal defendant and the d*yr* dock company the garnishee defendant I was the attorney of the garnishee defendant trying the case. I also represented Schulenburg in the case wherein he was garnishee defendant, and I represented Mr. Schulenburg in the chancery case and the dry dock company in the chancery case. I represented the dry dock company and the ferry company in all the litigation that was pending and that had been pending growing out of the collision between the Mamie and the Garland. I had represented Mrs. Horn in the suits in the superior court until she put her case in the hands

of Col. Atkinson and consented to a judgment against herself for $15,000.

While we were trying the case in the superior court and after having been at it for three or four days, I went into court one afternoon after the noon recess and was met by Mr. McVittie, who informed me they were talking about settling the controversy. My reply to him was that there would be no settlement if I had anything to do with the case. I had had all the settlement I cared for. We went up to the table where John Atkinson was and Mr. McVittie said to him, "Well, Wisner says he can't settle." Then Atkinson asked me if I would not give my consent to a settlement, and I said, no, I would not; I would not listen to it, and if the
143 dry dock company and Schulenburg were inclined to settle I would withdraw from their case and have nothing more to do with any of them. McVittie said to Atkinson, "Then we won't settle; we will go on with the case." Atkinson then suggested that we go into Judge Chipman's room and talk the matter over. So McVittie, Atkinson, and I went into Judge Chipman's room. Atkinson said, "Now, Wisner, if you will give your consent to this settlement, pay us that $3,000 that the dry dock company is willing to pay, we will close the matter up." My reply to him was, "Col., I won't consent to any settlement of this litigation because I am satisfied that nothing but a judgment will relieve my clients for the annoyances of litigation." He replied to that, "If you will pay us this $3,000 I will fix it so that none of these matters will ever come up again," and I turned to McVittie and said, "Do you want to settle it in that way?" McVittie said, "I think we had better." Well, I said, "Go on." We went right back into court and John Atkinson made a statement to the court that is a part of the record in the case; the stipulation and receipts were signed and the $3,000 paid over.

I went to Washington and had disposed of the suit pending in that court on appeal from the circuit court of the United States by filing a stipulation signed by counsel for parties, and the writ of error was dismissed. I had all the litigation in the Federal courts then pending discontinued without costs; the judgments and decrees in that court I had satisfied, and all the litigation in the superior court was discontinued and dismissed.

I never heard anything about paying Mrs. Horn any money or anything in relation to that at all until the motion was made in the chancery case in the superior court to set aside the discon-
144 tinuance. I supposed the whole matter was ended until that came up. That is all I know about it.

Cross-examination.

By Mr. BAKER:

Q. In the course of the negotiations in the superior court was anything whatever said to you about anything being done for Mrs. Horn?

A. Not a word; not a whisper.

Q. So that you had no conversation upon that subject at all?
A. It was not mentioned to me by anybody.
Q. Neither by you or Col. Atkinson?
A. Not a soul; not a word said to me about it by anybody.
Q. So you had no conversation with anybody upon the subject?
A. Not a particle.
Q. You say you represented Mrs. Horn up to a certain point. Is it not true that you had charge of her defense in all the cases that were commenced against the steamer Garland and against her and against her son, George Horn, as master of the steamer Garland, up to the time that Frederick Schulenburg entered into this contract with her?
A. I would say this: With the exception that the defense of the steamer Garland was not her defense. She did not own the steamer Garland when it was seized. I defended her in all the litigation that was commenced growing out of the collision between the Garland and the Mamie, and I defended the Garland, which was *the* owned by the dry dock company—not the dry dock company, but by the Detroit River Ferry Co.
Q. So you had charge of her interests, and you were the attorney and had been for some years, as I understand it, of Mr. Schulenburg?
145 A. Oh, no; I never had anything to do with Mr. Schulenburg?
Q. Of the dry dock company?
A. Yes, sir. I have been attorney of the dry dock company for ten years.
Q. So that you did not act for Schulenburg until he became involved in this matter?
A. Until he became the assignee of this contract.
Q. Did you continue to act for Mrs. Horn after Schulenburg became the assignee of that contract?
A. Yes, sir.
Q. Up to what time?
A. Up to the time that Mrs. Horn consented to the entry of a judgment against her for $15,000.
Q. Were you her attorney up to that moment?
A. I was her attorney until she asked that I stipulate that some other attorney take my place.
Q. That is, you acted as her attorney until that stipulation was signed?
A. Until that stipulation was signed.
Q. What stipulation was that? A stipulation substituting Col. Atkinson as attorney for her in the cases?
A. No; a stipulation substituting Mr. Cowles, Col. Atkinson's clerk, in the suits in the superior court, by Cuddy against herself.
Q. Against her individually?
A. Yes.
Q. Can you give us the date of that stipulation from your docket?

Witness refers to docket.

A. That stipulation was followed by a judgment of $15,000 against her by consent.

Q. That was not entered until after the attorneys were changed?

146 A. No, sir.

Q. I just want the date when your relations towards her ceased.

A. On the 4th of April, 1885.

Q. From that time on you have acted for Mr. Schulenburg?

A. Oh, yes; and before that time I acted for Mr. Schulenburg.

Q. That is what I want to get at. Before that time had any question arisen between Schulenburg and Mrs. Horn?

A. Yes, sir; Mrs. Horn had sued Schulenburg in the circuit court of the United States by John Atkinson, as the attorney, and she also filed a bill (referring to docket)—no, she had not filed her bill, but she had sued.

Q. Brought an action at law?

A. Yes.

Q. Did you defend Schulenburg in that suit?

A. I defended Schulenburg in that suit.

Q. Practically you have been Schulenburg's attorney from the time the contract was assigned?

A. I can't say that I have. I don't know that I have. I was his attorney in that way in that litigation. I don't know that he has had any other litigation.

Q. No; but I say as far as this litigation is concerned you have considered yourself as his attorney ever since he became interested in that contract?

A. No; I considered that I was in that litigation. I am not his general attorney.

Q. That is, you considered yourself as his attorney in respect to this matter ever since he has been connected with it?

A. Yes, sir; as far as I have been called on to act for him I have.

Q. And this suit at law that Mrs. Horn brought against Schulenburg, did she ask you to bring such a suit?

147 A. No; she never said anything about it.

Q. Had you any knowledge of its being commenced?

A. I never knew anything about it until Schulenburg brought me the declaration served upon him and asked me to defend his case.

Q. When you undertook the defense in that case. Why, the case had got in such shape you couldn't very well act for Mrs. Horn any longer, hadn't it, and you signed this stipulation substituting Mr. Cowles?

A. I don't exactly understand your question. I don't think you understand that question goes as far it does. I had not acted at all for Mrs. Horn in the matter in which that suit was brought.

Q. Certainly, I understand it. Schulenburg had taken Mrs. Horn's place under this contract?

A. Yes, sir

Q. And as far as it was in your hands or while it was in your hands there was no rupture between them, no disagreement or misunderstanding between them?

A. No.

Q. But the moment there was a conflict you ceased to act for her?

A. She ceased to ask me to act for her.

Q. Then you went on acting for him?

A. She employed Col. Atkinsons to act for her. I will state that Col. Atkinson was acting against her in the case in which I acted for her, and in the case in which I acted against her he was for her.

Q. When you tried this case in the superior court, when this settlement was made, he was acting for Cuddy, as administrator of these boys?

148 A. Yes, sir; and Mr. Cowles, his clerk, was acting for her and I was defending the dry dock company.

Q. Did Mr. Cowles participate in any way in the settlement?

A. Oh, no; he had consented to the judgment against her.

Q. That is, for a certain judgment against her as principal defendant?

A. Yes.

Q. And Col. Atkinson, as attorney for Cuddy, administrator, was pursuing his course?

A. Yes, sir; and he acted for her in the settlement as well as for Cuddy. He pretended to act for the side opposed to my side?

Q. Was Mrs. Horn there?

A. Yes, sir.

Q. Did you have any talk with her?

A. No; not much.

LEVI T. GRIFFIN, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Examined by Mr. WISNER:

Q. You recollect the occasion when we defended the Detriot Dry Dock Company in the superior court in the case of James H. Cuddy *vs.* Sarah Horn, the principal defendant, and The Detroit Dry Dock Company, garnishee defendant?

A. Yes, sir.

Q. Do you recollect, after two or three or four days of trial of that cause, a compromise was reached between the parties?

A. Well, yes; what might be called a compromise, perhaps.

149 Q. Can you state what was done in bringing about that compromise?

A. I remember Col. Atkinson was there for the other side, and it seems some one else was with him——

Q. Alfred Russell was with him?

A. Alfred Russel, if I recollect right. I had been ill, not very well then, but the suit came on and I took part with Mr. Wisner in

trying the case. I remember I was anxious to leave and, it seems to me, did leave soon afterwards. I remember distinctly that Mr. Wisner protested against paying anything to Mrs. Horn, as I understood it, but Mr. McVittie—I don't know that Mr. McVittie said this to me, but it came through Mr. McVittie, that Mr. Wisner finally assented to the payment, as I understood it, of $3,000 upon the hypothesis that it would settle all the litigation that had arisen out of the collision between the Mamie and the Garland, and I don't remember what entry was made, and I don't remember any of the details of the matter, Mr. Wisner being the chief counsel and the attorney and having all the knowledge of the details from beginning to end. I did not regard it as a matter of much importance how much of the details I knew, if there were any details; but I know that I understood that that was a settlement of the whole affair, so far as old Mr. Schulenburg was concerned, anyway, and my impression is that it was supposed to be an adjustment between all the parties to the litigation.

Q. Did you hear anything during the negotiations from anybody or from any direction about Mrs. Horn receiving something besides the $3,000?

A. No; on the contrary, that was to be the entire amount, and Mrs. Horn was to receive that as an entire adjustment of the difficulties which she had had with old Mr. Schulenburg.

150 Cross-examination.

Mr. BAKER:

Q. Col. Atkinson represented Cuddy, didn't he, as administrator in that suit?

A. Well, I presume he did. I can't answer particularly who he did represent.

Q. The suit you were trying was a suit to enforce a judgment, was it not, against Mrs. Horn by certain writs of garnishment?

A. I think it was.

Q. Who did you act for?

A. I acted with Mr. Wisner.

Q. For the garnishee defendant?

A. For the garnishee defendant—associate counsel with him.

Q. Did you hear any conversation between Col. John Atkinson and Mr. McVittie with regard to the settlement?

A. I don't think I did. I understood the only ones interested in that contract particularly were Mrs. Horn and Mr. Schulenburg.

Q. Were not Alfred Russel and the Cuddys interested in it?

A. They might have been, but they were not the ones that were cutting important figures in the case.

Q. What do you mean by important figures? They were the parties in the case, and generally the parties cut quite an important figure in a lawsuit, don't they? That was the legal situation, was it not?

A. That was the way, I believe, the case stood upon the records.

Q. There was a judgment against Mrs. Horn of about $15,000?

A. I believe so.

Q. Col. Atkinson and Mr. Russell were trying to show that the dry dock Co. had funds or property in its hands out of which the judgment ought to be paid?

151 A. I will tell you what my judgment is. I don't know whether it is a correct one or not. My impression is that the settlement was entirely between Mrs. Horn and Mr. Schulenburg—that is, as far as we were concerned—and that Mr. Russell had some arrangement—that they were satisfied that there was no case against the parties; that Mr. Russell, if he got anything, had his arrangement with Mrs. Horn—if he was to have anything.

Q. Did you have any talk with Mrs. Horn about it?

A. No, sir.

Q. With Mr. Russell?

A. No, sir.

Q. Who did you get your understanding from?

A. I think my understanding was chiefly from Mr. Wisner. I might have had some conversation of a general character with Col. Atkinson.

Q. You did not interest yourself enough in the negotiations to know the exact details of it?

A. No, sir.

Q. You are certain you did not hear any conversation between Col. John Atkinson and McVittie?

A. As far as I now recollect, I don't recollect that I did. I talked with Col. Atkinson about it. He was very anxious to have a settlement, and Mr. Wisner seemed to be the chief man that was in the way. In that way, while I could not tell you what Col. Atkinson said to me, I got my information in that way as to what it was, as well as from Mr. Wisner.

152 The proofs were then closed.

It is hereby stipulated between the respective counsel to the above-entitled cause that the signatures of the witnesses and the reading of their testimony to them shall be waived, and that the same may be used upon the trial and argument of the case with the same force and effect as though duly signed.

Filed Feb. 14th, 1888.

WALTER S. HARSHA, *Clerk.*

153 *Decree.*

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the second day of July, in the year one thousand eight hundred and eighty-eight.

Present: The Hon. Henry B. Brown, district judge.

SARAH HORN
vs.
THE DETROIT DRY DOCK COMPANY, THE DETROIT, BELLE ISLE & WINDSOR FERRY COMPANY, and FREDERICK SCHULENBURG. } In Equity. No. 3164.

This cause having been brought on to be heard on pleadings and proofs, F. A. Baker, Esq., appearing as solicitor for complainant and H. C. Wisner as solicitor for defendants, and after hearing the arguments of counsel, and upon due deliberation and consideration, it is now adjudged and decreed that the claim of complainant, as set forth in her bill of complaint, was before the filing of said bill fully settled and adjusted, as set forth in the plea filed to said bill. It is therefore further ordered, adjudged, and decreed that the bill of complaint be, and the same is hereby, dismissed with costs, to be taxed, and that defendant- have execution therefor.

154 *Application for and Notice of Appeal to Supreme Court.*

UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

SARAH HORN, Complainant,
vs.
THE DETROIT DRY DOCK COMPANY, THE DETROIT, BELLE ISLE & WINDSOR FERRY CO., and FREDERICK SCHULENBURG, Defendants.

From the decree entered in the above-entitled cause on the 2nd day of July, A. D. 1888, in favor of the defendants, the complainant, by F. A. Baker, her solicitor, on the 19th day of December, A. D. 1889, makes application for and gives notice of an appeal to the Supreme Court of the United States.

F. A. BAKER,
Sol'or for Complainant.

Allowed.
H. B. BROWN.

Dec. 19, 1889.

Filed Dec. 19, 1889.

WALTER S. HARSHA, *Clerk.*

155 *Order Allowing Claim of Appeal.*

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Thursday, the nineteenth day of December, in the year one thousand eight hundred and eighty-nine.

Present: The Hon. Henry B. Brown, district judge.

SARAH HORN
vs.
THE DETROIT DRY DOCK COMPANY, THE DETROIT, Belle Isle & Windsor Ferry Company, and Frederick Schulenburg. } In Equity.

The complainant having this day filed an appeal to the Supreme Court of the United States from the decree of this court dismissing her bill of complaint, entered July 2, 1888, said appeal is by the court now here allowed, and the amount of bond on appeal is hereby fixed at five hundred dollars.

156 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

SARAH HORN
vs.
FREDERICK SCHULENBURG, THE DETROIT DRY DOCK COMPANY, and THE DETROIT, BELLE ISLE & WINDSOR FERRY COMPANY.

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify and return to the claim of appeal on the part of the complainant, Sarah Horn, in the above-entitled cause that the above and foregoing are true copies of the record and proceedings of said court in said cause as the same appears of record and on file in my office; that I have compared it with the original and it is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this 6th day of February, in the year one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth.

Seal of the Circuit Court, Eastern District of Michigan.

WALTER S. HARSHA, *Clerk.*

Endorsed on cover: Case No. 14,070. E. Michigan C. C. U. S. No. 129. Sarah Horn, appellant, *vs.* The Detroit Dry Dock Company, The Detroit, Belle Isle & Windsor Ferry Company, and Frederick Schulenburg. Filed July 2, 1890.

Office Supreme Court U. S.
FILED.
OCT 28 1893
JAMES H. McKENNEY,
CLERK.

UNITED STATES OF AMERICA.

Supreme Court of the United States.

October Term, 1893.

Term No. 129.

SARAH HORN,
Complainant and Appellant,
vs.
FREDERICK SCHULENBURG, THE DETROIT DRY DOCK CO., and THE DETROIT, BELLE ISLE & WINDSOR FERRY CO.,
Defendants and Appellees.

BRIEF FOR APPELLANT.

F. A. BAKER,
Solicitor for Appellant.

DETROIT:
POTTER PRINTING CO.
1893.

UNITED STATES OF AMERICA.

Supreme Court of the United States.

October Term, 1893.

Term No. 129.

SARAH HORN,
Complainant and Appellant,
vs.
FREDERICK SCHULENBURG, THE DETROIT DRY DOCK CO., and THE DETROIT, BELLE ISLE & WINDSOR FERRY CO.,
Defendants and Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

Sarah Horn, the complainant and appellant, was the owner of the steamers Excelsior and Garland, used in navigating the Detroit river and connecting waters. The De-

troit Dry Dock Co. held mortgages on these steamers aggregating $22,643

July 22, 1880, the Garland, while proceeding on an excursion down the Detroit river collided with the steam-yacht Mamie, having on board an excursion of acolytes from Trinity church, in Detroit, and a large number of those on board the Mamie were drowned.

The personal representatives and heirs of those so drowned claimed the Garland was in fault, and commenced suits in the district court of the United States in admiralty, to recover damages on account of their death.

Personal actions were also commenced against the complainant in the superior court of the city of Detroit, for damages on account of said collision, and certain other legal proceedings took place before the steamboat inspectors and a coronor's jury.

The complainant employed the law firm of Wisner & Speed to defend the suits so commenced, and to protect her interests in this litigation.

Pending these suits for damages, the steamer Garland was sold under an order of the maritime court of Ontario, for supplies furnished by Canadian parties, and she was bid in and purchased by the Detroit Dry Dock Co., for the complainant, for $17,050.

The complainant transferred the steamer Excelsior, subject to the mortgages thereon, to her son John Horn, and an execution against him was levied upon her, and she was sold and bid in for the complainant by the Detroit Dry Dock Co., in the name of Alex. McVittie, its secretary.

The Detroit Dry Dock Co. also became responsible to Wisner & Speed for their fees.

All of which was with the understanding that the Detroit Dry Dock Co. was to hold the title to the two steameres as security for the indebtedness and advances, and to

run and operate them, and to render a faithful account of their earnings, and when the indebtedness and advances were paid, to return the steamers to complainant.

The stockholders of the Detroit Dry Dock Co., organized the Detroit River Ferry Co., and the Garland and Excelsior were operated and managed in the name of that company.

The Detroit River Ferry Co. was consolidated with the Detroit & Windsor Ferry Co., and a new company was incorporated under the name of The Detroit, Belle Isle & Windsor Ferry Co.

The new company issued to the Detroit Dry Dock Co. for the Garland and Excelsior 600 shares of its stock, of the par value of $60,000, and this stock took the place of and stood in lieu of said steamers in the subsequent transactions between the Detroit Dry Dock Co. and the complainant.

By the 26th day of June, 1881, the dividends upon the stock, and the surplus of $11,000, received from the maritime court of Ontario, had reduced the indebtedness of complainant to the Detroit Dry Dock Co. to less than $29,000, and the 600 shares of stock were worth $70,000.

All of the foregoing facts are set forth and alleged in the first seven paragraphs of the bill of complaint.

Record, pp. 2-5.

The main facts are also stated in the preamble to the agreement between complainant and the Detroit Dry Dock Co. of June 27, 1881.

Record, pp. 9, 10, 26, 27.

The preamble purports to be drawn upon the theory, that the Detroit Dry Dock Co. had become the absolute owner of the stock, and that the complainant had no equity of redemption or other rights therein, but this

theory is overturned by the concluding paragraph of the preamble, which is as follows:

"And whereas, said Sarah Horn has expressed a desire to purchase a part of said stock, and the said Detroit Dry Dock Company *in view of the matters aforesaid, and of its past business relations with said Sarah Horn* is now disposed to deal generously with said Sarah Horn, by making a favorable sale to her of part of said stock, although it does not admit she has any legal claim upon said company in respect thereto."

The agreement which follows the preamble, is a contract on the part of the Detroit Dry Dock Co. to sell and deliver to Sarah Horn 600 shares of stock of the Detroit, Belle Isle & Windsor Ferry Co., and to advance and pay to Wisner & Speed their charges for services, and their disbursements and expenses in the suits and litigation arising out of the collision of the Garland and Mamie.

In consideration of the foregoing agreement on the part of the Detroit Dry Dock Co., the complainant, Sarah Horn, agrees to pay to the company the sum of $51,000 within three years, with interest at ten per cent., and also to pay to the company any sum or sums it may advance to Wisner & Speed, the same to be paid within three years if the litigation is concluded, and if not, within thirty days after it is concluded.

The dividends on the stock as received by the Detroit Dry Dock Co., to be applied on the indebtedness of complainant; that is, on the $51,000, and the advances made.

Record, pp. 11-12.

This agreement does not appear to be subject to criticism except in this, that in placing the amount due from the complainant at $51,000, a much greater sum was demanded than she really owed.

The complainant's signature to this agreement was procured by her son in law, Albert Schulenburg, who is the son of the defendant, Frederick Schulenburg.

The agreement was put in writing for the purpose of having all of complainant's rights under it, and in and to the 600 shares of stock therein mentioned, transferred to Frederick Schulenburg. Such assignment and transfer was executed by Sarah Horn, June 28, 1881. The assignment itself is not annexed to the bill as an exhibit, but a copy is annexed to the petition of Frederick Schulenburg to remove the case from the State to the Federal Court, and the original was identified by the witness, Alex. McVittie.

Record, pp. 16, 25, 37.

Complainant alleges that the agreement and understanding between Albert Schulenburg and herself was, that Frederick Schulenberg was to pay her $200 a month for three years for living expenses, and at the end of three years deliver back to complainant $25,000, par value of said stock free and clear of all encumbrances; that the day after she executed the assignment of the stock, Albert Schulenburg brought her exhibit B of the bill, by which Frederick Schulenberg promised to pay her $200 a month for three years, but made no promise about returning $25,000 of the stock; that she refused to accept exhibit B; and thereupon Albert Schulenburg put it in a desk he used in her house, but stated to her that it would make no difference, and that his father would carry out his agreement to the letter; that Frederick Schulenburg paid her $200 a month for three years as agreed, but at the end of that time repudiated the agreement to return to her $25,000 of the stock, par value, sometimes pretending that no such agreement was made, and at other times that it was void because not in writing.

These allegations are contained in the 8th and 10th paragraphs of the bill.

Record pp. 5, 7.

Complainant further alleges that she brought an action against Frederick Schulenberg, and recovered a verdict against him for $32,000, but a new trial being granted, the court ruled that her proper remedy was in equity, and directed a verdict in favor of the defendant.

Record, p. 7.

She then alleges that all the 600 shares of stock had been transferred to Schulenberg, except 175 shares still held by the Detroit Dry Dock Co., but it appears by the plea and answer of the Detroit Dry Dock Co., that before the bill was filed it had transferred all of said 600 shares of stock to Frederick Schulenburg, so that the Detroit Dry Dock Co., and the Detroit, Belle Isle and Windsor Ferry Co., are not necessary parties, except so far as it may be necessary to bind them in granting relief against Frederick Schulenburg, who is the real defendant.

Record, pp. 12, 33, 34.

Complainant then alleges that Schulenburg has received from the earnings of the stock sufficient to reimburse him for all payments made for her, and that all the actions, suits, judgments, and proceedings against the Garland, and against the complainant have been compromised with her approval by the payment by the Detroit Dry Dock Co., of the sum of $3000.

Record, p. 7.

As modified by the fact that all of the 600 shares of stock had been transferred to Frederick Schulenburg the

PRAYER FOR RELIEF

is, "that said Frederick Schulenburg may be decreed, in case his agreement with your oratrix is held to be valid, to transfer to your oratrix $25,000, par value of said stock

free and clear of all incumbrances, and to account for and pay over to your oratrix the earnings of said stock since the same should have been transferred to her, and in case said agreement is held to be invalid, that said Frederick Schulenburg" may be declared to be a trustee for complainant of all of said stock, and that an accounting may be had, &c., with the usual prayer for other and further relief.

Record, p. 8.

SCHULENBURG'S DEFENSE.

The defendant, Frederick Schulenburg, does not deny the case made by the bill, but sets up by plea, a defense of accord and satisfaction.

Record, p. 29.

In the first ten paragraphs of his plea, the defendant, Schulenburg, gives a history of the litigation instituted by James H. Cuddy as the administrator of the several persons drowned in the collision, and shows that April 21, 1885, Cuddy by consent of Sarah Horn, obtained a judgment against her for $15,000, damages, and $270 costs, and that garnishment proceedings were taken against the Detroit Dry Dock Co. and Frederick Schulenburg, as garnishee defendants, to collect this judgment from them.

Record, pp. 29, 32.

In the eleventh paragraph of his plea the defendant, Schulenburg, alleges that during a jury trial of the issue in the garnishment proceedings, a compromise was made of all the matters of difference, and that $3000 was paid to Col. John Atkinson as attorney for James H. Cuddy and Sarah Horn, in full settlement of the Cuddy judgment and claims and in full settlement of all claims of Sarah Horn

against the Detroit Dry Dock Co. and Frederick Schulenburg.

The plea alleges that the $3000 was paid "on behalf of said Detroit Dry Dock Co., and Frederick Schulenburg," and the following receipt is set forth :

"For a valuable consideration to us in hand paid we hereby acknowledge satisfaction of all claims and demands of every name or nature, which we or either of us may have from the beginning of the world up to the present time against the Detroit Dry Dock Company, the Detroit River Ferry Company, the Detroit, Windsor & Belle Isle Ferry Company, Alexander McVittie, Albert R. Schulenburg, or Frederick Schulenburg, or any of them.

Detroit, March 17, 1886.

JOHN HORN, JR.
SARAH HORN."

Record, p. 32.

The complainant filed a replication to the plea, and upon the issue so joined, testimony was taken before an examiner, and reported to the court.

Record, p. 35, pp. 35-88.

The case was heard before Hon. Henry B. Brown, District Judge, on pleadings and proofs, and a decree entered sustaining the plea, and dismissing the bill.

The complainant appeals.

1.

The case presented by complainant's bill is a simple and meritorious one.

Sarah Horn's right to redeem the 600 shares of stock in the Detroit, Belle Isle & Windsor Ferry Co., was a very valuable right of property. Any one at all familiar with the great beauty, and usefulness to the people of the city of Detroit and vicinity, of the Detroit river, with Belle Isle, and its park, Lake St. Clair, and the St. Clair Flats on the north, and Grosse Isle, Sugar Island, Bois Blanc, and Lake Erie on the south, can readily understand the successful and lucrative nature of the ferry and excursion business in which the complainant and the corporations who succeeded her, were engaged.

Under negotiations between complainant and Frederick Schulenburg, which were conducted by Albert Schulenburg, who is the son-in-law of one of the parties and the son of the other, the complainant assigned her rights under the agreement of June 27, 1881, to Frederick Schulenburg. In virtue of this assignment Frederick Schulenburg redeemed the 600 shares of stock and became the owner and holder thereof. The complainant shows that the agreed consideration for this assignment was $200 a month for three years, and the return to her at the end of the three years of $25,000 of the stock at its par value.

Frederick Schulenburg, in his petition for removal to the Federal Court, denies that he was to return any of the stock to complainant; but no such defense is interposed to the bill by plea, or answer, so that the complainant's case stands on this record as confessed.

It is also worthy of note, that Frederick Schulenburg was not sworn as a witness in his own behalf, and that although Albert Schulenburg was sworn as a witness for his

father, he makes no denial of the complainant's case on the merits as stated in her bill.

Record, pp, 79-82.

As far as the merits are concerned, therefore, the complainant upon this record, as it stands, is entitled to a decree, and the only question in the case is whether the plea of accord and satisfaction can be sustained.

II.

The plea of accord and satisfaction, under the proofs in the case, can not be sustained.

Alexander McVittie, the secretary of the Detroit Dry Dock Co., was called as a witness for the defendant Schulenburg, and on his direct examination, testified to the execution of the receipts of March 17, 1886, and the payment to Col. Atkinson of $3000. He also testified that Col. Atkinson acted for the Cuddy claimants, and for Sarah Horn.

Record, pp. 38, 39.

On his cross-examination, Mr. McVittie distinctly and positively stated that he made the settlement with Col. Atkinson alone, and that he had no talk whatever with Sarah Horn.

Record, p. 47.

He also testified, that he did not consult Frederick Schulenburg or Albert Schulenburg upon the subject of the settlement.

Record, p. 46.

But, he admits that at the request of Col. Atkinson he asked Albert Schulenburg to pay Sarah Horn $50 a month for a while, to live on; that Albert Schulenburg refused to pay anything, and said he would see her starve to death first; and that witness so reported to Col. Atkinson.

Record, p. 46.

Witnesses further testified, that Schulenburg did not pay any of the $3000, and that the only reason the witness had for including him in the settlement was, that he "wanted the whole matter closed up; didn't know what might grow out of it;" but on redirect-examination, he testified that Schulenburg's share of the $3000, was arranged *afterwards*.

Record, pp. 51, 52.

At the close of McVittie's testimony, the defendant rested his case.

Record, p. 53.

The witnesses for the complainant were Col. Atkinson and the complainant herself.

Col. Atkinson testified that during the trial of the suit in garnishment, the testimony developed the fact that a certain amount of money remained in the hands of the Dry Dock Company, which actually belonged to Mrs. Horn; that on the face of it, this amount was about $5000, but Mr. McVittie explained that some expenditures had reduced it to about $3000; that Mr McVittie expressed a willingness to pay that amount; and that with the understanding that Albert Schulenburg was to pay Sarah Horn $50 a month, and upon the death of his father carry out the agreement to turn over to her $25,000 of the stock, the settlement was made.

Record, pp. 53-64.

It appears from Col. Atkinson's testimony, that he had all his talk with Alex. McVittie, and that he had no conversation with Albert Schulenburg; that McVittie would talk with Atkinson awhile, and then go and talk with Albert Schulenburg, who was present in the court room during the negotiations; and that he, Atkinson, had no reason to doubt, and did not doubt McVittie's authority to make the promise for Albert; that he relied upon McVittie's assurance, and reported it to Mrs. Horn; that without it the settlement in his opinion would not have been made, and that no one talked with Mrs. Horn about it except the witness, and that he believes and thinks that she relied on it, and expected it would be carried out.

Record, pp. 56, 57.

Sarah Horn, testified, that personally she had no talk with anybody about the settlement, except with Col. At-

kinson, who told her that she was to have $50 a month as long as old Mr. Schulenburg lived and at his death was to have $25,000 of the stock; that she relied upon it; and would not have settled without it.

Record, pp. 64, 65.

She further testified that she did not say anything to Col. Atkinson about the possibility of the old gentleman not leaving Albert any of the stock, it not occurring to her, and that she did not know what the law was in regard to such promises.

Record, pp. 65, 66.

In rebuttal, the defendant recalled Alexander McVittie, who testified that the Garland earned some $10,000 for the Dry Dock Co. the fall after the company purchased her at the sale, and that the whole thing when footed up showed that the Dry Dock Co. was the gainer about $5000, on the money it had put in.

Record, pp. 66-68.

After considerable effort on the part of the counsel for defendant, witness repeated his testimony that Col. Atkinson wanted Mr. Schulenburg to agree to pay Mrs. Horn $50 a month for a time, and that Albert Schulenburg refused to do so.

Record, pp. 68-71.

On cross-examination, the witness testified that Frederick Schulenburg had no interest in the $5000; that he did not pay any part of $3000, that was paid; and that he did not own any stock in the Dry Dock Co.

Record, p. 71.

"Q. What interest was it, then, to you to include him in the settlement?

A. Nothing more than that we had been together in other transactions, and I did not know, but what some litigation might grow out of that.

Q. This was a suit in garnishment against the Dry Dock Co.?

A. Against the Dry Dock Company; yes.

Q. That was the only suit that was pending against the Dry Dock Company, was it?

A. There were other suits at that time, I think, pending against the Dry Dock Company.

Q. What suits?

A. I cannot give them to you. The record shows what the suits were.

Q. So that Schulenburg, without paying anything or being interested in the settlement at all, was included in the settlement upon your motion?

A. Yes, sir; he was included in that settlement.

Q. You say you refused to make any settlement unless he was included?

A. Yes, sir.

Q. Did Col. Atkinson, in the negotiation and talks had there, ask to have something done for Mrs. Horn?

A. As I just said, he asked that $50 a month should be paid to her.

Q. Who did he want to pay that?

A. Albert Schulenburg.

Q Did he want Albert Schulenburg or you to agree to pay that?

A. Albert Schulenburg.

Q. Did he have any talk with Albert Schulenburg to your knowledge?

A. Not to my knowledge.

Q. The conversation was all between you and Col. Atkinson?

A. Yes, sir.

Q. What did Col. Atkinson finally say when he receded from that position?

A. I don't know that he said anything that I remember; I have no recollection of the words.

Q. Was there no further talk about it?

A. Not that I have any recollection of; no.

Q. So that Col. Atkinson started out, when he started out talking about the settlement, with the proposition that he did not want Frederick Schulenburg included in that?

A. No.

Q. And then, when you insisted on having him included, he wanted the Schulenburgs among them to do

something for the old lady to keep her out of the poor house?

A. Yes.

Q. That is the way he talked with you?

A. Yes.

Q. You went and consulted with Albert, but not in the hearing of Col. Atkinson; Col. Atkinson didn't hear you talk with Albert?

A. I don't think he heard the first conversation, but I don't know about the second conversation.

Q. You would not say that he did?

A. I would not say that he did; no, sir.

Q. So that, as I understand you, you simply reported to him that Schulenburg would not do it?

A. I reported that to him; yes.

Q. Was that all there was of it?

A. The balance was consulting with him on that basis.

Q. I know; but you went on and made some papers—concluded a settlement?

A. The papers were made.

Q. You concluded a settlement; but what was said by which Atkinson indicated, or you arrived at a conclusion, that nothing should be done for Mrs. Horn, you can't say. What did Atkinson say about that?

A. I have no recollection of what he said; only he said he would draw up a paper and make a statement to the court.

Q. Didn't you have a conversation like this: while Albert would not agree to do it, and you representing that side, while you said you would not agree to do any such thing you said you would do something for her?

A. I would?

Q. Yes.

A. No, sir.

Q. Or Albert?

A. No, sir; *I might have said that as he was her son-in-law he might help her*, but I gave him to understand that he would not do anything. He was very bitter in his opposition to her.

Q. Wasn't it about this way: that you would not agree to do anything so you would be bound by it, but that you had no doubt that he would do something for her so she would not have to go to the poor-house?

A. *I might have;* but he said he would not do anything in any way."

Record, pp. 71-73.

"Q. Where was Frederick Schulenburg when this settlement was made, do you know? Was he here in town?

A. I don't remember now whether he was. I think he was.

Q. You didn't consult him in regard to it?

A. I did not.

Q But you did consult with his son, Albert?

A. I did.

Q. Was he acting for his father, or for whom?

A. I could not say.

Q. You only consulted Albert in regard to Col. Atkinson's wishes about providing something for Mrs. Horn. You did not consult him in regard to the settlement you were making for the Dry Dock Company?

A. I did not. I talked with him in court about what Col. Atkinson wanted.

Q. If Col. Atkinson had not wanted something for Mrs. Horn you would not have consulted Albert?

A. I think I would; yes.

Q. Why?

A. Because this whole deal we were all more or less mixed up in. I wanted the thing to be final; I wanted him to know about it.

Q. I want to know why you should intercede in behalf of Schulenburg?

A. Because I hoped Schlenburg would pay a part of the $3000.

Q. *Did you ask Albert to pay her?*

A. *I did.*

Q. *What did he say?*

A. *He said when he was able to pay it he would pay it.*

Mr. Wisner: He has since paid it, hasn't he?

A. *He has given me a note for it.*

Mr. Baker: For how much?

A. *$1,500.*

Q. *Albert agreed to do that when you were talking about making the settlement?*

A. *Yes, sir.*

Q. That is all that he could say, that he would pay it when he could?

A. Yes, sir.

Q. What was the object of that?

A. To save us from paying out $3000. We thought we ought not to pay it all out.

Q. You think you ought to have a part of it for yourselves?

A. Yes, sir.

Q. Did Albert Schulenburg give you that note at the time?

A. Yes, sir, he did; or within a few days of it. I don't remember now.

Q. Did Albert say he would not agree to do anything for the old lady, but of course he might?

A. He did not say that he might, at all. He was opposed to doing anything.

Q. Or agreeing to anything?

A. Or agreeing to anything.

Q. *But you told Atkinson you thought he would?*

A. *I thought he would have to, and I thought he would take care of the old lady in the way of keeping her from starving.*"

Record, pp. 74-75.

Albert Schulenburg was also sworn in rebuttal, and testified that he had no conversation with Col. Atkinson; that McVittie said to him that Col. Atkinson wanted him to agree to pay Mrs. Horn $50 for a couple of years, and that he refused to do so, and that this conversation with McVittie was repeated when Atkinson stood along side of McVittie and himself, but that Atkinson never spoke to him in regard to the matter.

Record, pp. 79, 80.

George Horn, a son of complainant, in the employ of the Detroit, Belle Isle & Windsor Ferry Co., testified that he heard Albert Schulenburg tell McVittie that he would not pay complainant $50 a month, and would not agree to it at all. He does not pretend that he heard McVittie say anything to Atkinson.

Record, p. 82.

Henry C. Wisner and Levi T. Griffin, the counsel for the garnishee defendants, testified that they did not hear anything during the negotiations about Mrs. Horn receiving something besides the $3000, but as there is no pretence

that they heard the conversation between Atkinson and McVittie, their testimony is not important.

Record, pp. 82, 86.

I think the foregoing is a substantially correct statement of the testimony in the case relative to the alleged settlement.

It is clearly apparent, that on the one side we have the testimony of Alex. McVittie as to the terms of the settlement as agreed upon between him and Col. Atkinson, and we also have his testimony and that of Albert Schulenburg as to what took place between them.

On the other side, we have the testimony of Col. Atkinson, as to the terms of the settlement as agreed upon between him and McVittie, and we have his testimony and that of Sarah Horn, as to what took place between them.

The plea of the defendant is one of accord and satisfaction, and the burden of proof is upon him.

I insist, therefore, that upon any view that can be properly taken of the case, the conclusion must be that the plea is not sustained.

There is no fact or circumstances in the case that throws discredit on Col. Atkinson's testimony, and there is no proof in the case contradicting it, except the testimony of Alex. McVittie.

The conversation between McVittie and Albert Schulenburg is no more effective and convincing than that between Col. Atkinson and Sarah Horn, so that the only proof to support the plea is that of McVittie, which is contradicted by that of Atkinson.

I submit, therefore, that under the proofs as they stand in this record, the court, without determining whether Atkinson or McVittie is to be believed, should hold that the plea of accord and satisfaction is not sustained.

The receipts of March 17, 1886, do not mention the

$3000, or any other specific sum or thing as their consideration. On the contrary, they simply recite that "For a valuable consideration," etc.

It is clear that it is competent to explain a receipt of this kind by oral proof showing what the real consideration actually was, and that a mere receipt is always subject to explanation by parol evidence.

This doctrine is distinctly recognized by this court in the second subdivision of the opinion of the court, as prepared by Mr. Justice Brown, in *Fire Insurance Association vs. Wickham, 141 U. S., 564*, and in which the learned justice cites the following cases approvingly.

Simons v. Johnson, 3 Barn. & Ad., 175.
Lawrence v. Schuylkill Nav. Co., 4 Wash. C. C., 562.
Payler v. Homersham, 1 Maule & S., 423.
Jackson v. Stackhouse, 1 Cow., 122.
Grumley v. Webb, 44 Mo., 444.
Price v. Treat, 29 Neb., 536.
St. Louis Ft. S. & W. R. Co. v. Davis, 35 Kan., 464.

Inasmuch as these receipts do not purport to give the consideration on which they were based, they are not even *prima facia* evidence thereof, and it is just as competent for the complainant to prove that the consideration included a promise to her, as it is for the defendant to prove that the agreed consideration was the $3000, actually paid.

The receipt signed by Sarah Horn, left the question of the actual consideration open, and subject to parol proof, so that she is in no sense concluded thereby.

The plea of accord and satisfaction, therefore, cannot be sustained, because the party having the affirmative on that issue has not sustained the plea with a preponderance of evidence.

There is another reason, that is still more fatal to the defendant.

The actual parties to the transaction were Sarah Horn

and Frederick Schulenburg, each acting through an agent, so that we have a case where through some misapprehension or mistake, the agents made contradictory reports to their principals, one reporting the terms of the settlement one way, and the other another way.

Is this not a typical case for reaching the conclusion, that the minds of the parties did not meet, and that the supposed contract, or agreement to compromise, for that reason fails?

In *Utley vs. Donaldson, 94 U. S., 29*, this court in an opinion by Mr. Justice Swayne, stated the law on this subject as follows:

"There can be no contract without the mutual assent of the parties. This is vital to its existence. There can be none where it is wanting. It is as indispensable to the modification of a contract already made as it was to making it originally. *Where there is a misunderstanding as to anything material, the requisite mutuality of assent as to such a thing is wanting; consequently, the supposed contract does not exist, and neither party is bound.* In the view of the law in such case, there has been only a negotiation, resulting in a failure to agree. What has occurred is as if it were not, and the rights of the parties are to be determined accordingly."

The learned justice cites and states the following cases, where this doctrine was applied, and none of them present as clear a case of a misunderstanding as the case at bar

Phillips vs. Bistolli, 2 Barn. and C., 511.
Baldwin vs. Mildeberger, 2 Hall, 176.
Coles vs. Browne, 10 Paige, 526.

In another instructive case in this court the opinion of the court was also delivered by Mr. Justice Swayne.

First Nat. Bank vs. Hall, 101 U. S., 43.

III.

The plea of accord and satisfaction cannot be sustained for the reason that the proofs show that Frederick Schulenburg was not a party to it.

The testimony of Alex. McVittie when he was first on the stand was unequivocal, that when the settlement was made he did not consult Frederick Schulenburg or Albert Schulenburg; that Frederick Schulenburg did not pay any part of the $3,000; and that Frederick Schulenburg was included in the settlement for the protection in some way of the Detroit Dry Dock Co., and not for his own benefit. Before the witness left the stand he testified that Schulenburg's share of the $1,000 was arranged *afterwards.*

Record, pp. 46, 51, 52.

When McVittie was called in rebuttal, he again testified that Frederick Schulenburg did not pay any part of the $3,000, and that he, McVittie, did not consult him or his son Albert in regard to the settlement.

Record, pp. 71, 74.

Further on he testified that when he was making the settlement, he asked Albert Schulenburg to pay Mrs. Horn, that is, pay the $3,000; that Albert said he would when he was able to, and that at the time, or a few days afterwards, Albert did give witness *his* note for $1,500.

Record, p. 75.

Albert Schulenburg's testimony on this subject was as follows:

"Q. When McVittie told you that they were willing to settle the whole controversy for $3,000, he asked *you* to pay half of it?

A. Yes, sir; he asked *me* if *I* would pay half.

Q. And *you* agreed to pay half?

A. Yes, sir; I told him that I thought if they were bound to make a settlement with them, that they should not pay the whole of it.

Q. And *you* did pay half of it, or settle with him?

A. Yes, sir."

Record, p. 80.

There is no proof in this record that Frederick Schulenburg, or anyone authorized to represent him, had anything to do with the settlement, or that he was in any way a party to it, or bound by it.

The case calls, therefore, for an application of the familiar doctrine that one party to a contract is not bound unless the other is.

An accord and satisfaction would certainly have to be binding as to both of the parties, in order to be binding at all; and in fact it is the rule as to all contracts that there must be mutuality of obligation.

1, Parsons on Contracts, pp. 449-452.
Dorsey vs. Rockwood, 12 How., 126.
Governor, &c., vs. Fox, 3 E. L. & E., 420.

I submit the decree below dismissing the bill ought to be reversed, and the court below directed to enter a decree for complainant.

F. A. BAKER,
Solicitor for Appellant.

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UNITED STATES OF AMERICA.

Supreme Court of the United States.

October Term, 1893.

Term No. 129.

SARAH HORN,
Complainant and Appellant,
vs.
FREDERICK SCHULENBURG, THE DETROIT DRY DOCK CO., and THE DETROIT, BELLE ISLE & WINDSOR FERRY CO.,
Defendants and Appellees.

Appeal from the Circuit Court of the United States, for the Eastern District of Michigan.

BRIEF FOR APPELLEE.

LEVI T. GRIFFIN and
C. E. WARNER,
Of Counsel.

DETROIT:
POTTER PRINTING CO.
1893.

Supreme Court of the United States.

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vs.
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Defendants and Appellees.

Appeal from the Circuit Court of the United States, for the Eastern District of Michigan.

BRIEF FOR DEFENDANT, SCHULENBURG.

STATEMENT OF CASE.

The bill in this case was filed by the complainant on or about May 10, 1887, in the Circuit Court for the County of Wayne, (Mich.,) in chancery, and was afterwards, and prior to the time of filing the plea by the defendant, removed into the Federal Court for the Eastern District of Michigan, in Equity. The two defendant corporations were organized under the laws of Michigan, but defendant Schulenburg was a citizen of Missouri and a resident of St. Louis.

The Detroit Dry Dock Company filed a plea, averring that before the bill was filed, it had transferred all of the six hundred shares of stock which that company was to hold, in lieu of its mortgages on the steamers, to the defendant Frederick Schulenberg, and it is, therefore substantially admitted by complainant's counsel (Brief, p. 6,) that the Detroit Dry Dock Company and the Detroit Belle Isle & Windsor Ferry Company are not necessary parties; and we assume, therefore, that they may be eliminated from the case.

A substantially accurate statement of the bill is made by complainant's counsel in his brief, and it will not be necessary, therefore, to repeat the same *in extenso*. The material allegations, so far as the present controversy is concerned, as affecting the defendant Schulenburg, are contained in paragraphs 8 to 15 inclusive, of complainant's bill, and are, in substance, that the defendant Frederick Schulenburg held said stock under an agreement, by which he was to advance a certain indebtedness to the Detroit Dry Dock Company; would assume all liabilities which it had assumed on behalf of complainant; would pay complainant $200 per month for three years, for living expenses, and would take and hold said stock and manage the same, *and at the end of three years deliver back to complainant $25,000 of the par value of said stock, free and clear of all incumbrance.*

The bill prays that the defendant Schulenburg, may be decreed to transfer to complainant $25,000 of the par value of said stock, free and clear of all incumbrance, and to account and pay for the earnings of said stock since the same should have been transferred to her.

To this bill, the defendant Schulenburg, interposed a plea (Rec., p. 29) in which it is averred, after the recital of certan litigation which had theretofore been pending, arising out of the various collisions and various claims and interests in and to said steamers, that during the trial of cer-

tain garnishee proceedings against the Detroit Dry Dock Company, "*all of said parties got together, and then and there entered into a full and complete adjustment and settlement of all claims and demands, and of all of said litigation, and all the conditions of said agreements were then and there performed, and in pursuance thereof there was then and there paid, on behalf of said Detroit Dry Dock Company and Frederick Schulenberg to, and received by, John Atkinson, the attorney of the said James H. Cuddy and Sarah Horn, in said settlement, the sum of $3000 agreed to be paid. Stipulations were signed and delivered, discharging all of said judgments, and decrees for the discontinuance without costs of all of said suits* pending as aforesaid. And the said Cuddy and the said Sarah Horn then and there executed and delivered receipts and acquittances in the words and figures following, viz: * * * * * * * * *

"*For a valuable consideration to us in hand paid, we hereby acknowledge satisfaction of all claims and demands of every name and nature which we, or either of us may have from the beginning of the world up to the present time against* the Detroit Dry Dock Company, the Detroit River Ferry Company, the Detroit, Windsor & Belle Isle Ferry Company. Alexander McVittie, Albert R. Schulenburg, *or Frederick Schulenburg, or any of them.*

Detroit, March 17, 1886.

JOHN HORN, JR.
SARAH HORN."

This statement presents substantially the issue raised by the pleadings and proofs. The cause came on for hearing in the court below before the Hon. Henry B. Brown, who found by the decree (Rec., p. 89) that the claim of the complainant was, before the filing of said bill, fully settled and adjusted, as set forth in the plea to the said bill, and such bill was therefore dismissed. Complainant appeals.

ARGUMENT.

It will be observed that the issue presents purely a question of fact to be determined upon the record.

It is contended by complainant's counsel that the plea of the defendant is one of accord and satisfaction, and that the burden of proof rests upon him ; and it is urged, therefore, that as there exists the testimony of McVittie upon one side, as to the terms of the settlement, and Col. Atkinson upon the other, that the accord and satisfaction has not been made out.

Let us look, therefore, at the situation ; and it may aid the court in order to ascertain the situation, to look at the facts which precede the making of the agreement and receipt of March 17th, 1886, whereby this complainant confessedly executed and delivered the receipt and agreement, wherein for a valuable consideration she acknowledged "*satisfaction of all claims and demands of every name and nature which she might have from the beginning of the world up to the present time*" *against the defendant, Frederick Schulenburg, and other parties mentioned in the agreement.*

It appears by the bill that complainant was the owner of the steamers Excelsior and Garland, and that she was largely indebted to the dry dock company upon certain mortgages then existing against the boats. That in July, 1880, the Garland collided with the steam yacht Mamie, and a large number of those on board the Mamie were drowned. That the personal representatives and heirs of those so drowned commenced suits to recover damages. That a certain other suit was commenced against the Garland by parties residing in Canada, under which the vessel was sold *pendente lite* and the Dry Dock Company purchased her for $17,050.00, which increased the indebtedness of

complainant to the Dry Dock Company by that amount.

That afterwards, complainant conveyed the Excelsior to her son, John Horn, against whom a suit was brought and judgment entered, and under which said steamer was also purchased by the Dry Dock Company. That afterwards, the Detroit River Ferry Company was organized and the vessels transferred to said company. That the Detroit, Belle Isle and Windsor Ferry Company was subsequently organized, and the said steamers, including the steamer Fortune, transferred to said company, and the Dry Dock Company received in payment for the said steamers, Garland, Excelsior and Fortune, capital stock in the new company to the amount of $83,000.

On June 27th, 1881, the complainant and the Dry Dock Company entered into a written agreement (Record, p. 26,) reciting the various proceedings which had been taken against the steamers and the further fact that $83,000 of the stock of the Detroit, Belle Isle & Windsor Ferry Company had been issued to certain persons in trust for the Detroit Dry Dock Company.

This agreement then expressly specified as follows: (Fol. 16.)

"And whereas, said Sarah Horn has expressed a desire to purchase a part of said stock, and said Detroit Dry Dock Company, in view of the matter aforesaid, and of its past business relations with said Sarah Horn, is now disposed to deal generously with said Sarah Horn by making a favorable sale to her of part of said stock, although it does not admit she has any legal claim upon said company in respect thereto."

Following is an agreement upon the part of the Detroit Dry Dock Company to *sell* to Mrs. Horn, 600 shares of the capital stock of said company, and to pay and advance to Messrs. Wisner & Speed, certain disbursements in certain suits.

In consideration of this agreement, complainant agreed to pay to the Dry Dock Comyany $51,000 within three years from the date, with annual interest; also to pay any sums of money that might have been advanced by Wisner & Speed, etc.

She further agreed to release, discharge, convey and quit claim any and all interest, claims or demands which she might have, or pretend to claim to have, against the Dry Dock Company to either of said boats, or the earnings or proceeds of sale received, or to be received, by said Detroit Dry Dock Company, by either of said ferry companies. (Fol. 18.)

On June 28th, 1881, the day after the foregoing agreement was executed, complainant executed and delivered to defendant Schulenburg *an assignment* of all her interest, claim or demand of, in or to said 600 shares of stock, which were to be delivered to her upon payment of the certain moneys mentioned in the said agreement; and she thereby authorized Schulenburg to demand and receive the said stock, money or other claim, or interest thereby transferred, and to enforce the performance of the said agreement. (Record, Fol. 47.)

On the same day Schulenburg executed and delivered a written agreement (Exhibit B, Fol. 19), by which, in consideration of such assignment, he agreed to pay to the complainant *$200.00 per calender month, for three years from and after its date.*

So far as appears from the record to this point, therefore, it appears that complainant's interest in the three steamers, had become entirely divested; and she held an agreement only, to purchase 600 shares of said stock, by which she was to pay $51,000.00, and a certain other large indebtedness to Wisner & Speed, the amount of which does not appear.

It is not pretended that she had any means whatever.

In fact the record shows that a part of the negotiations were based upon giving her money enough to live upon. Under the agreement between her and the Dry Dock Company, she was to receive no income or dividends. She thereupon confessedly assigns her interest in the stock and this agreement between herself and the Dry Dock Company to Schulenburg; and she confessedly received from Schulenburg $200 per month, as provided in the agreement executed by Schulenburg. (Fol. 19, Exhibit B.) Amounting to upwards of $7000. +

+ On August 6, 1884, complainant began suit on the law side of the court below for redress upon the same state of facts involved in the bill in the present cause. Judgment was eventually rendered in favor of defendant Schulenberg. A bill of exceptions had been settled and an appeal was pending on March 17, 1886.

Bill, par. 11, p. 7.
Plea, par. 8, p. 31.
Stip., fol. 29, p. 22.

On January 20, 1886, complainant filed a bill in the superior court of Detroit, in chancery, for the same cause of action as in the case at bar, which suit was also pending and undetermined on the above-mentioned date, to wit, March 17, 1886.

Plea, par. 9, p. 31.
Stip., fol. 45, p. 24.

fendant which such garnishee defendant holds by conveyance, transfer or title that is void as to the creditors of the principal defendant; and such garnishee shall also be liable on any contingent right or claim against him in favor of the principal defendant."

On March 11, 1886, this issue in garnishment came on to be tried before a jury, and thereupon was continued for several days, and during said trial, the parties got together and the agreement of March 17, 1886, was made (Rec., Fol.

61), whereby complainant released defendant, Schulenburg, among others, from "*all claims and demands of every name and nature which he might have from the beginning of the world up to the present time.*"

It must not be forgotten that the defendant, Schulenburg, was a party to that litigation. Cuddy had secured a judgment against Mrs. Horn and in those garnishment proceedings, it must be evident that the title of Schulenburg to the stock in question, as also any possible or contingent interest, which Mrs. Horn might have therein, was just as effectually attacked as though it had been in the name and behalf of Mrs. Horn herself.

Now with the matters in this suitation: With the right of the complainant denied; with her interest in the stock, if she had any, sought to be subjected to the judgment of Cuddy for $15,000 by the garnishment proceedings; all parties come together and the complainant solemnly and deliberately, by an agreement in writing, acknowledges satisfaction in full of all claims and demands against either or any of the parties, including the defendants.

It is by no means, therefore, conceded that the issue stands upon the testimony of McVittie upon one side, and Atkinson upon the other.

Independently of the force and effect of this testimony, the complainant is first met with the following presumptions against her:

1. She has deliberately and solemnly executed in writing the release of March 17, 1886, which contains no reservation of the kind contended for whatever. It is positive, absolute, unambiguous and unequivocal.

2. She has executed and delivered (Rec., Fol. 26,) an assignment, absolute in form and effect, of all her interest, claim or demand of, in and to the said stock, and of all her interest, claim or demand of, in and to any moneys payable to her by said agreement. This assignment is exe-

cuted by her under seal and contains nothing whatever to justify the claim made by her.

3. While she denies, by her bill, that she actually accepted the terms of the agreement for the payment of $200 per month, (Exhibit B, fol. 19,) yet it appears by the bill that said paper is found in her possession, and she admits by said bill, (Rec., Fol. 9, Par. 10,) that she received, during the three years provided by said agreement, $200 per month, as agreed. While she was sworn as a witness in the cause, (Fol. 113,) yet she does not deny that she received this paper bearing its full import, and nothing further.

The complainant, therefore, stands before the court as one having either executed or received papers of this solemn import in writing, and she must overcome these written agreements by testimony which can leave no doubt upon the mind of the court that they were executed and received precisely as they import.

These papers, Exhibit A and Exhibit B, are set forth in complainant's bill and exhibits thereto, and are admitted, and may be considered upon the determination of the question.

If it be conceded that the receipt in question is of the character and import which will permit it to be contradicted by parol testimony, within the principal of *Fire Insurance Association v. Wickham, 141 U. S., 564*, cited by complainant's counsel, yet we think it must equally be conceded that papers of this solemn character will require a high degree of proof to be overcome.

In case of *Simons v. Johnson, 3 B & A 175*, cited by counsel, it was held that parol evidence was admissible to show that the subject matter of the then present action was not involved in the receipt.

In the case at bar, there is no room for the application of such a doctrine. The agreement is clear and specific,

and is an acknowledgment of the satisfaction of all claims and demands "*of every name and nature, from the beginning of the world.*" There is no room for ambiguity.

Read in connection with the subject to which it related, it involved and embodied a contract, and upon the strength of such receipt and the settlement of all disputes, the defendants, in the action in garnishment, paid the sum of $3000.

Now, in any event in order to overcome this receipt, it would certainly require evidence of as high a character as would be necessary to reform a contract, by showing *mistake*, and in cases of this charcter, it is held that the error should be admitted or *distinctly proved*, that the preponderance of evidence should be clear, *and the evidence should be so convincing as to leave no reasonable doubt upon the mind of the court, and should be established beyond cavil.*

Hunter v. Hopkins, 12 Mich., 227-229.
Case v. Peters, 20 Mich., 303.
Uhl v. Allen, 18 Mich., 107-109.
Adam's Equity, p. 171.
Tripp v. Hasceig, 20 Mich., 263.
Luddington v. Ford, 33 Mich., 123.
Bispham's Prin. of Equity, Secs. 184, 190, 191, 469, 470.

It is said by defendant's counsel at the outset, that the right to redeem the 600 shares of stock was a very valuable right of property, and that any one at all familiar with the beauty and usefulness of the Detroit River can readily understand the lucrative nature of the ferry business.

This, however, begs the question. We may as well urge that the lucrative character of the business, if such exists, was the *incentive* which induced the defendant to as-

sume the large indebtedness which was owed by the complainant to the Dry Dock Company, and to his agreement by which he undertook to pay $200 per month to the complainant for the period of three years. The evidence shows that he has already paid in excess of the par value of said stock.

It is incomprehensible that the complainant, surrounded and protected as she was, by able and astute attorneys, should have assigned the stock in question to defendant Schulenburg without receiving an agreement, embodying in full the terms of the agreement and arrangment under which said stock was assigned. Neither of these agreements, to-wit: the agreement of assignment, nor the agreement by which defendant agreed to pay her $200 per month for three years, contained any "right of redemption" whatever; and the "right to redeem" does not exist, and is not claimed by complainant's counsel. The complainant only prays for a transfer of the 25,000 par value of the stock which she claims it was agreed should be transferred to her at the expiration of three years.

II.

We pass from the strong presumption which must exist in favor of the defendant in consequence of the execution of the receipt and agreements specified, to a discussion of the question upon the oral proofs, independently of the agreements, and this proof should leave no doubt upon the mind of the court that the complainant has utterly failed to establish her claim.

Alexander McVittie was sworn upon the part of the defendant, (Fol. 68, *et. seq.*) and testified that he was the secretary of the Dry Dock Company since 1872; that he

recollected the pendency of the suits in the Superior Court, and also the pendency of the garnishment proceedings; that the claim of the plaintiff in that suit was based upon the contract which the Dry Dock Company had made for the sale of ferry stock to Mrs. Horn. That the contract of June, 1881, was used upon the trial of that cause in evidence; and he identified the execution of the various papers. That the trial in the Superior Court continued for three or four days; that a settlement was made by the parties in which he took an active part, Col. Atkinson as representing Mrs. Horn, and the Cuddy claimants, and himself as representing the Dry Dock Company and Frederick Schulenburg.

That he paid $3 000.00 as the consideration for the settlement by a check to the order of Col. Atkinson, and upon the payment of that money he received the papers executed by Cuddy, and by John Horn, Jr., and complainant Sarah Horn.

Stipulations were thereupon drawn and executed, and all the suits growing out of the collision were withdrawn.

Mr. McVittie's testimony upon cross-examination does not modify or qualify the force or effect of his testimony in chief. It appears by this cross-examination in substance, that during the trial (Fol. 82, *et. seq.*) a suggestion was made for a settlement of the litigation, when Mr. McVittie said that if Mr. Owen approved of it, he would pay $3000 for a final settlement of everything.

He further testified, in referring to a conversation with Col. Atkinson: "He said, couldn't we pay it and leave Schulenburg out. I says, no, it must settle every case—Schulenburg, the Ferry Company, the Dry Dock Company and all parties interested; and after a good deal of talk back and forth, he requested me to see whether Schulenburg would not give Mrs. Horn something to live on; pay her $50 a month for a short time; and I went to Schulen-

burg at his request; went across the court room, and told what Atkinson had said to me, and he refused point blank to talk about it—to pay anything. I came back and told Atkinson of that, and the next day he again asked me to see whether he wouldn't do something for her; she was poor, and it wouldn't be much of this $300, and I went to him again with the same result."

He further testified (Fol. 83) that this was told to Col. Atkinson; that the settlement came up in the afternoon of one day and was settled in the forenoon of the next. Albert Schulenburg was there both days.

At folio 87 he testifies that I. T. Cowles, of Mr. Atkinson's office nominally represented Mr. Horn, in the litigation; that Mrs. Horn was a witness for Cuddy, and when not upon the witness stand was in consultation during the trial with Mr. Atkinson and sat by him.

At folio 90, he says that Col. Atkinson stated "that if you will pay us that $3,000, we will settle all this litigation in such a way that it will never come to life again"—words to that effect. That the conversation with reference to Schulenburg taking care of Mrs. Horn was in the presence of George Horn.

At folio 92, that the witness consulted Mr. Wisner as the attorney for Schulenburg with reference to a settlement of the case, and that Schulenburg's share of the $3,000.00 was arranged with him afterwards.

At folio 121 Mr. McVittie further says, that in the matter of the settlement they were talking about all this litigation, the various suits against the Dry Dock Company, myself, Schulenburg, Mrs. Horn's suits against us, the garnishee suit, and everything we had been interested in.

At folio 122 he says: "He, (Col. Atkinson) asked me to arrange with Schulenburg to give Mrs. Horn $50 a month for a time; he didn't say how long.

He first wanted to leave Schulenburg out of the settle-

ment. I said there is no use of talking about leaving anybody out; it wont be considered. He then said, will Schulenburg take care of the old lady, keep her from going to the poor house; give her $50 a month, and I said, I don't know; I don't think he will; and I went over in the court room, at the suggestion of Col. Atkinson, to see if Schulenburg would do anything, and he would not do anything. I came back and told Col. Atkinson what he said."

At the second interview he again requested me to see whether Mr. Schulenburg would not do anything, and I went a second time, to Schulenburg, with a like result.

This testimony of Mr. McVittie leaves it clear that the purpose and intent of the settlement was to settle up all matters involved in the litigation.

Mr. Schulenburg was represented upon the trial. The Dry Dock Company was also represented. The litigation had continued for several years. Mr. Wisner was solicitous that the matters be settled finally and irrevocably, and suggested that no course would settle it other than the judgment of the court. The suggestion of $3000 was eventually made. Whether this should include Schulenburg was a matter of distinct discussion.

The settlement was finally agreed upon and the receipt in question executed, which leaves it beyond question, in so far as the language and terms of the receipt is concerned, that it was designed to settle all matters between them.

If within the principle of *Simons vs. Johnson*, the receipt should be held to include only matters involved in the litigation; yet it distinctly appears that Schulenburg's interests were involved in that litigation equally with the other parties, and the receipt would cover it.

Henry C. Wisner was also sworn (p. 52,) and testified that the stipulations referred to in the various cases in the

plea were duly filed, and the orders discontinuing the cases and satisfying the judgments and decrees referred to, were entered. That he went to Washington in the case pending in the supreme court of the United States, in which Cuddy was trying to pursue the Garland, and presented the stipulation and obtained an order dismissing that suit, in accordance with the stipulation.

On cross-examination, he testified, that defendant Schulenburg was responsible for any decree that might be rendered against the boat, by virtue of a contract with the bondsmen, to pay any decree which should be rendered against him. That when Schulenburg bought from Mrs. Horn, he assumed Mrs. Horn's obligations to pay any decree rendered against the boat.

Mr. Wisner was again called (p. 82,) and states, among other things, that he was the attorney for the garnishee defendants in the trial of the cause. He also represented Schulenburg in the case wherein he was garnishee defendant, and also in the chancery case as well as the Dry Dock Company in the chancery case. He represented the Dry Dock Company and the Ferry Company, in all the litigation growing out of the collision between the Mamie and the Garland. He had represented Mrs. Horn in the Superior Court, until she put her case in the hands of Col. Atkinson, and consented to a judgment against herself for $15,000.

His testimony is very emphatic in regard to the settlement. He stated, in reply to Col. Atkinson, "Col., I won't consent to any settlement of this litigation, because I am satisfied that nothing but a judgment will relieve my clients from the annoyance of litigation." He replied to that, "If you will pay us this $3000, I will fix it so that none of these matters will ever come up again." And I turned to McVittie, and said, "Do you want to settle it in that way?" McVittie said, "I think we had better." "Well," I said, "go on." We went right back into court,

and John Atkinson made a statement to the court, and it is a part of the record in the case. The stipulations and receipts were signed and the $3000 paid.

On cross-examination (fol. 146,) he testified that his relations with Mrs. Horn ceased on April 4, 1885, and from that time on he acted for Mr. Schulenburg. Mrs. Horn had previously sued Schulenburg in the Circuit Court of the United States, by John Atkinson as the attorney; he defended Schulenburg in that suit.

Albert Schulenburg, a son of the defendant, Frederick Schulenburg, testified, that he was present when the litigation was settled. That McVittie came over to him and said that Atkinson was proposing a settlement, and asked him what he thought of it. He said that Atkinson wanted him to agree to give Mrs. Horn $50 a month for a couple of years; and he told him he could not do that, and wouldn't do it. That he had already done all that he intended to. Atkinson stood alongside of McVittie and myself when McVittie spoke about it. He said, "Col. Atkinson wants you to give Mrs. Horn that $50 a month." He says, he don't care for you to say any definite time you were to give to her; but just give her $50 a month. You can stop at any time—and I said I wouldn't do it.

He further testified (fol. 138,) that his father paid on that contract, by way of expenses and advances made by the Dry Dock Company, over $60,000. That in addition to that sum, he paid Mrs. Horn $200 a month for three years, amounting to $7200, so that his father actually paid more than the par value of that stock, by $4200.

On cross-examination (fol. 139), he states the amounts paid by his father as $51,000 to the Dry Dock Company, $6,000 to Wisner & Speed, and $200 a month for three years to Mrs. Horn.

It will be seen, therefore, that he has paid more than the par value of the stock.

On page 82, he testifies that the stock of the Ferry Company was not worth any more than its par value, either at the time his father took the contract for the stock, or at the time he acquired the ownership.

George Horn also testified in behalf of defendant (fol. 141), that he heard McVittie ask Albert Schulenburg about his mother. That he came over to Albert and he said, "Atkinson proposes settling the case," and he wanted to know if Albert would agree to give his mother $50 a month, when Albert said he would not agree to it at all. He wouldn't have anything to do with it.

Levi T. Griffin, an attorney at law, was also sworn in behalf of the defendant and testified that he recollected the suit in the Superior Court of Detroit in favor of *Cuddy vs. the Dry Dock Company*, garnishee defendant. The compromise was reached after two, three or four days; that Mr. Wisner finally assented to the payment, as he understood it, of $3000, upon the hypothesis that it would settle all the litigation that had arisen out of the collision between the Mamie and the Garland. He understood that that was a settlement of the whole affair, so far as old Mr. Schulenburg was concerned anyway, and his impression was that it was supposed to be an adjustment between all the parties to the litigation. He heard nothing during the negotiations, from anybody, about Mrs. Horn's receiving something besides the $3000. That was to be the entire amount, and Mrs. Horn was to receive that as an entire adjustment of the difficulties which she had had with old Mr. Schulenburg.

Now all this testimsny upon the part of the defendant, which is positive in character, as to the understanding of

the parties representing that side of the litigation, in any event, is sought to be overcome by the testimony of one witness only, Col. Atkinson.

While it may be true that tendency of Col. Atkinson's testimony is to the effect that Albert Schulenburg, *son of the defendant*, should pay Mrs. Horn $50, a month, and eventually see that she was paid for the property that had been placed in her hands (folio 97) yet we think that this testimony is not of such a convincing character as would entitle it to stand a moment in opposition to the positive and unequivocal character of the evidence upon the part of the defendant, to say nothing about the character of the evidence which would be required to overcome the written agreements.

This witness starts out upon a wrong assumption in his testimony. He says, (folio 96,) that the testimony upon the trial developed the fact that a certain amount of money remained in the hands of the Dry Dock Company, which actually belonged to Mr. Horn; while upon the other hand, Mr. McVittie testified (folio 115) *that there was no money in the hands of the Dry Dock Company belonging to her.*

Mr. McVittie says that he brought a statement down to the court showing that in all their details, outside of Mrs. Horn, in the purchase of the several ferry boats, they had cleared $5,000 in the trade at that time. In the entire dicker the Dry Dock Company had made about $5,000; but there were costs and charges against that.

Under the agreement "Exhibit A," assuming that Mrs. Horn then held it, she was only entitled to a re-purchase of certain stock upon the payment of $51,000, and certain expenses of Wisner & Speed.

The suggestion upon the trial came only from the fact that in the entire dicker, as stated, the Dry Dock Company had made a little money, and in this view McVittie

was willing to pay $3000 to stop all this business finally.

It will be observed further, that Col. Atkinson does not pretend that any arrangement was made by which *Frederick* Schulenburg, the father, should undertake to carry out any arrangement of the character claimed.

Col. Atkinson says, (Folio 97,) "that Albert Schulenburg expected eventually to be in a position to carry it out by receiving property from his father, but at present he would be able to carry out the monthly payments, and that he was to do so."

Not only is this arrangement, however, denied by Mr. McVittie positively and unequivocally, but Albert Schulenburg himself testifies emphatically that there was no arrangement of this kind whatever; that while it was suggested, he positively declined to entertain it; and George Horn corroborates both McVittie and Albert Schulenburg in this regard. (Folio 141.)

Now, it is apparent that the testimony of Mr. Atkinson upon this important phase of the controversy is denied and repudiated by at least three responsible witnesses.

Col. Atkinson further testifies that Mrs. Horn received about $700 from this settlement of $3000.

He further testifies (Folio 99,) that the chancery suit, and the other litigation between Mrs. Horn and Mr. Schulenburg were included upon the settlement, upon the assurance of McVittie. McVittie would talk with him awhile, he says, (Folio 100,) and then go and talk with Albert. Albert was sitting in the room during the negotiations—all done right in the court room.

Now it will be noted that Col. Atkinson distinctly says that the chancery suit and the other litigation between Mrs. Horn and Schulenburg was included in the settlement upon the assurance of Mr. McVittie. It cannot be contended, therefore, that it was not designed to cover and settle the entire matters between all parties by this settlement; and

the case does not fall, therefore, within the case of *Fire Insurance Company vs. Wickham.*

The complainant, therefore, cannot stand upon the idea that there were certain matters unsettled, not intended to be embraced in the receipt.

Upon cross-examination Col. Atkinson admits that at the time the settlement was made there were pending a number of suit in the United States court, involving the same subject-matter that we had over here; that he knew of cases on the record in the United States Court involving the same subject matter, and that a veraict was rendered for the defendant by direction of the court; that he knew generally that there were a large number of suits in various forms, and that while trying the case in court, and after having been trying it for three or four days, the question of settlement came up between him and Mr. McVittie. Mr. Wisner acted as an obstruction in the way for a time, and his opposition was quite forcible. (Folio 103.)

They finally settled, and the $3000 was paid and receipts were given, and stipulations signed for the discontinuance of all pending litigation without costs.

At folio 106, in referring to the Cuddy litigation Mr. Atkinson says that it was a case where it was somewhat difficult to get the testimony, and "*they agreed with me that a certain amount of money should be paid in case of success.* They paid it; and it all came into my hands, and that amount was paid over, *and of that I gave Mrs. Horn the amount she got.*" Now, in the face of this, it cannot be contended with any show of reason, that this settlement did not involve the matters against Schulenburg. Look at the situation for a moment.

Cuddy had secured a large judgment, and had garnished both the Dry Dock Company and Schulenburg. Mrs. Horn stood in the attitude practically of the plaintiff in that suit. She was co-operating with the plaintiff,

understanding that she should participate in the results of that litigation.

If Schulenburg was under any obligation to turn over to Mrs. Horn $25,000 of stock as claimed, then the plaintiff in that suit was entitled to reach the stock, and it was really the subject matter of the controversy. As is seen, Mrs. Horn was co-operating with Cuddy to that end. The case is settled. Schulenburg is released and discharged with the other creditors, and Mrs. Horn participates in that settlement by receiving about $700.00.

It is the height of absurdity, as it seems to us, to now claim that the settlement did not involve Schulenburg's liability to account to Mrs. Horn for this stock.

In case of *Rice vs. Bank*, lately decided in the Supreme Court of Michigan, arising upon garnishee process, the court say:

"The process was effectual to stop payment and make the bank liable to plaintiff instead of Gauthier," (the principal defendant.)

Counsel in his brief (page 18,) contends that there is no fact or circumstance throwing discredit on Col. Atkinson's testimony; and that there is no proof in the case, contradicting it, except the testimony of Alexander McVittie.

He further says, that the only proof to support the plea, is that of McVittie, which is contradicted by that of Atkinson.

How does this leave the contest? It must be conceded that the testimony of McVittie is fully as reliable as that of Atkinson in any event, and if this be the situation, then Col. Atkinson's testimony is fully met by that of Mr. McVittie and the receipt stands of full force and effect. This would seem to be the correct and logical conclusion. But it is not true as stated, that there is no proof in the case contradicting Col. Atkinson, except that of McVittie.

Upon the other hand, McVittie is supported and corroborated, both in fact and circumstance, by Wisner, Schulenburg, George Horn and Griffin.

It is contended by complainant's counsel, that inasmuch as the receipts do not purport to give the consideration, that it is just as competent to prove that the consideration included a *promise* as to prove that the agreed consideration was the $3000 actually paid.

This, however, is not the logic of the receipt. The consideration is assumed to have *preceded* the giving of the receipt. The bill does not declare upon a promise made by Albert Schulenburg to give her $50 a month, and eventually to give her $25,000, but it declares that for a valuable consideration "*to us in hand paid*" the complainant acknowledges satisfaction of all claims and demands, &c. It would be a direct repudiation of the terms of the receipt to say that she can now prove that the consideration was not "*paid in hand*" but was a promise to do something in the future.

It is said further by defendant's counsel that the actual parties to the transaction were Sarah Horn and Frederick Schulenburg, each acting through an agent, and that through some misappehension or mistake, contradictory reports were made to their principals by the agents, and that therefore the minds of the parties did not meet, and the supposed contract or agreement of compromise for that reason fails.

Utley vs. Donaldson, 94 *U. S.*, 29, is cited to support the contention, but it seems to us that the doctrine of that case can have no application whatever to the present case.

In that case there was an *executory* contract; the minds of the parties did not meet. Neither party had become bound, no consideration was paid, and the court held that the requisite mutuality of assent was wanting.

In the case at bar, however, the contract had been *ex-*

ecuted by the Dry Dock Company and Schulenburg, and the reasou of the rule, therefore, does not apply. We apprehend that the rule does not apply to *executed* contracts. It would certainly be unjust and inequitable to apply it in the present case.

The Dry Dock Company and Schulenburg upon the basis of the receipt, had paid $3000, which the complainant had in part received. It does not lie with her, therefore, or with any of the parties to that contract, to say: "True, we have received and appropriated the consideration of the contract, but the minds of the parties did not entirely meet, and consequently neither should be bound, and we should be permitted to retain the $3000, and at the same time to repudiate the receipt as an acknowledgment of satisfaction in full."

The most that could be urged under such circumstances is that there was a "mistake;" but the rule is clear that in order to sustain a bill for relief upon such a ground, it is essential that the error be *on both sides*, and that it be admitted by defendant or *distinctly proved*.

Adams Equity, p. 171.
Tripp vs. Hasceig, 20 Mich., 263.
Ludington vs. Ford, 33 Mich., 123.

In *Grove vs. Hodges, 55 Pa. St., 504*, it is held that want of mutuality is no defense to either party except in cases of *executory* contracts.

But the court cannot find *as a fact* that there was any misapprehension or mistake. While Mrs. Horn herself did not actually enter into the negotiations, she was represented by counsel. Frederick Schulenburg was not only represented by counsel, but also by his son. It was a matter of discussion, *pro* and *con*, as to what should be involved in the settlement. The minds of the parties certainly met if the testimony is to be believed. Complainant

received the benefit of that settlement, has accepted it, and never restored, or attempted to restore the consideration which she received. It does not lie with her now to repudiate it.

It is further contended by counsel, under the third head of his brief, that the plea of accord and satisfaction cannot be sustained, for the reason that the proofs show that Frederick Schulenburg was not a party to it. This, however, is a mistake.

The testimony of McVittie is distinct, that all proceedings including the garnishment proceedings, against Schulenburg must be settled. Wisner represented Frederick Schulenburg actually as his counsel, and for a considerable time opposed and obstructed the settlement for the very reason that he feared that such a settlement would not conclude all the parties to the proceedings. Upon the assurance of Col. Atkinson that "if we would pay up the $3,000.00, he would fix it so that none of these matters would ever come up again," he assented to the settlement.

Further than this; Frederick Schulenburg was represented by his son, Albert Schulenburg, and it appears in the testimony and is uncontradicted that Albert Schulenburg afterwards gave his note for one-half this settlement. (Record, p. 75.)

It is further submitted that the story of the complainant is inherently improbable, and this gives force to the contention that the $3000 was in settlement of the entire matters. The stock which Mrs. Horn agreed to purchase under the agreement, Exhibit A, represented at par $60,000. There is no evidence which we now recall which shows it to have been worth more than par. The testimony of defendants, upon the other hand is, that the time the contract was made, and also at the time the stock was acquired, it was not worth to exceed par. (Fol. 141, p.

82.) For this stock, Mrs. Horn agreed to pay $51,000 in cash, and all amounts which might be paid to Wisner & Speed, which the testimony shows amounted to about $6000. The day succeeding this agreement, Mrs. Horn assigns this stock to defendant Schulenburg, who agreed to pay her $7200, by paying $200 per month for three years. These amounts would bring the obligation of Mr. Schulenburg up to $64,200. Now, it is claimed by Mrs. Horn that there was an agreement or understanding by which for three years Schulenburg should take and hold said stock and manage the same, and at the end of three years, "*deliver back to her $25,000 par value of said stock, free and clear of all incumbrances.* The claim is inherently improbable. There is nothing to base it upon, either in the business of the company or the value of the stock. This agreement was made in June, 1881, and she now claims that at the time of the settlement on March 17, 1886, she not only was to have this stock returned but $50 a month for living expenses, in addition. As before seen, the claim is improbable upon the face of it.

She could not have understood at the time of the settlement of March 17, 1886; that any such liability existed upon the part of Defendant Schulenburg, and such an understanding, improbable as it is, cannot be made the basis for such a claim. Schulenburg had paid all and more than the stock was worth. His liability to Mrs. Horn had been attacked in the garnishment proceeding. This alleged liability was resisted and contested. The parties came to a settlement, $3000 is paid. She acknowledges the receipt of this money "*in hand paid,*" and gives the release and discharge in full—broad and conclusive in its character.

We submit therefore, that the plea has been fully sustained, not only by the proofs, but by the circumstances and probabilities. The learned judge of the court below was fully familiar with the issue. He knew the parties and the witnesses. He was qualified to judge of the credibility which should be attached to the testimony.

We submit, therefore, that his conclusions are irresistible and that the decree should be affirmed.

L. T. Griffin and
C. E. Warner,
Of Counsel for Def'ts.